No. 79-732

IN THE SUPREME COURT
OF THE UNITED STATES

FRED W. PHELPS, SR.,

Petitioner,

adv.

THE STATE OF KANSAS,

Respondent.

* * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES
(To the Supreme Court of Kansas)

* * * * * * *

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF KANSAS

TO: The Honorable Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Fred W. Phelps, Sr., prays that a Writ of Certiorari be issued to review the judgment order of the Supreme Court of the State of Kansas in the above case finalized August 30, 1979.

A. Opinion Below

The official report of the opinion of the Kansas Supreme Court appears at 226 Kan. 371, and a copy of said opinion is attached hereto and incorporated herein as Appendix "A".

Rule No. 7.06 of the "Rules Relating to Supreme Court, Court of Appeals and Appellate Practice", which regulates appellate practice in the State of Kansas, provides in essence that opinions of the Supreme Court do not become effective, and a final mandate is not entered, until twenty (20) days following the date of the decision. The text of said Rule, Rule No. 7.06, is attached hereto and incorporated herein as Appendix "B".

In addition, the Petitioner herein filed a Motion to Stay (which was amended shortly after it was filed) before the Supreme Court of Kansas, requesting that the Supreme Court's opinion of disbarment be stayed pending the outcome of a federal action challenging the constitutionality of certain aspects of the Supreme Court's opinion. The Supreme Court of Kansas denied the amended motion for stay on August 30, 1979. A copy of that final order denying the amended Motion for Stay is attached hereto and incorporated herein as Appendix "C".

B. Jurisdiction

The date of the final judgment sought to be reviewed is either August 9, 1979 or August 30, 1979. It is the position of Petitioner that the final date was August 30, 1979, when Petitioner's amended Motion for Stay was denied. At the very

earliest, the Supreme Court's opinion became final twenty (20) days after July 20, 1979, or August 9, 1979. See Rule No. 7.06 of the "Rules Relating to Supreme Court, Court of Appeals and Appellate Practice", Appendix "B".

The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari are: Rules 19, et seq., of the Supreme Court of the United States Revised Rules, 28 U.S.C.A.; 28 U.S.C. § 1257(3); 28 U.S.C. § 2101(c); and any other statutory or common law basis not specifically cited, which confers jurisdiction in this Court to review by Writ of Certiorari actions taken by high courts of a state which are alleged to be unconstitutional.

C. Questions Presented

Petitioner believes the questions presented for review can be fairly stated as follows:

1. Whether Petitioner was denied procedural due process during the course

of disciplinary proceedings before the Supreme Court of Kansas.

2. Whether Petitioner was denied substantive due process during the course of disciplinary proceedings before the Supreme Court of Kansas.

3. Whether the Rules of the Kansas Supreme Court Relating to Discipline and Disbarment of Attorneys, as applied to Petitioner, are unconstitutional.

4. Was Petitioner denied vital constitutional rights, including First Amendment and Fourteenth Amendment rights?

D. Constitutional Provisions, Statutes and Regulations Involved

The disciplinary proceedings effected against Petitioner in the State of Kansas were done pursuant to certain Rules adopted by the Supreme Court of Kansas. After the proceedings were commenced, but before the conclusion of the proceedings, some of the Rules were changed. The Rules are lengthy. The Rules in effect, when the disciplinary action was commenced,

were entitled "Rules Relating to the Admission, Discipline and Disbarment of Attorneys", and may be found officially reported at 220 Kan. lxxxiii - xcix; cix - cxxvii. Effective January 8, 1979, the Rules were amended in part, the Rules thereafter being referred to as "Rules Relating to Discipline of Attorneys", and those Rules may be found officially reported at 224 Kan. lxxi - cx. Petitioner generally challenges the constitutionality of these Rules as applied to him.

To satisfy the specific requirements of United States Supreme Court Rule 23(d), 28 U.S.C.A. p. 47, Petitioner will set forth verbatim those Rules primarily involved herein. Said Rules will be set out verbatim followed by reference to the official citation.

Rule 211(f)

"(f) At the conclusion of a hearing held by a panel, a report shall be made to the Disciplinary Board setting forth findings and recommendations, which report shall be signed by a majority of the panel and

submitted to the Board. To warrant a finding of misconduct the charges must be established by clear and convincing evidence. * * *" (Emphasis supplied). 224 Kan. lxxvi

Rule 212(e)(5)

"(e) If the respondent files exceptions the following steps shall be taken: * * *

(5) The matter shall be set for hearing and heard on the merits." (Emphasis supplied). 224 Kan. lxxxvii

Rule 216(d)

"(d) Upon request, the Disciplinary Administrator shall disclose to the respondent all evidence in his possession relevant to the proceeding. No other discovery shall be permitted. (Emphasis supplied). 224 Kan. lxxxviii

Rule 216(e)

"(e) At the discretion of the hearing panel, a prehearing conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held

before the chairman of
the panel or any member
of the panel designated
by its chairman." 224 Kan.
lxxxviii*

Rule 222(a)

"(a) All proceedings, reports
and records of disciplinary
investigations and hearings,
except as hereinafter provided,
shall be private and shall not
be divulged in wnole or in
part to the public except
by order of the Supreme Court. * * *"
224 Kan. xci

Rule 222(b)

"(b) All persons violating subsec-
tion (a) may be subject

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*Petitioner does not challenge the propriety of this Rule per se. However, as the Rule was used herein, it was unconstitutional. As the "Statement of the Case" below will show, a prehearing conference was conducted during which the issue was severely limited. Petitioner proceeded at the hearing based on the limited issue, and presented evidence on that issue. *However, the Supreme Court of Kansas thereafter based their opinion of disbarment on many, many matters outside that issue.*

to punishment for contempt
of the Supreme Court. * * *"
224 Kan. xci

Rule 223

"(a) All proceedings, re-
ports and records of disci-
plinary investigations and
hearings other than proceed-
ings before the Supreme Court
shall be private and shall
not be divulged in whole
or in part to the public
except by order of the Court.

(b) Any person violating
paragraph (a) may be sub-
ject to punishment for con-
tempt of Court." 220 Kan. xcii*

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*Rule 223, 220 Kan. xcii, was the Rule in force and effect when the disciplinary proceeding herein was commenced. It was changed during the course of the proceeding.

In addition, K.S.A. 60-211 is involved herein, and that statute provides:

> "Signing of pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading has not been served. For a willful violation of this section an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if

> scandalous or indecent matter is inserted."

Petitioner also believes that at a minimum the First Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution are involved, and those amendments provide respectfully:

First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment

> "§ 1. Citizenship; privileges or immunities; due process clause. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **Apportionment of Representatives.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§ 3. **Disqualification for office by insurrection or rebellion.** No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

§ 4. **Validity of debts.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation

of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. Enforcement of amendment. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

E. Statement of the Case

The instant Petition for Writ of Certiorari emanates from an original action in discipline before the Supreme Court of Kansas.

The disciplinary action commenced following alleged wrongdoing by Petitioner during the trial, and post-trial motions, of Robinson v. Brady, Case No. 125,742 in the District Court of Shawnee County, Kansas. During the course of said trial, Petitioner made certain proffers of what he expected certain prospective witnesses to testify. The trial court in Robinson refused to allow those persons to testify. Following the trial,

and a verdict for the defendant Brady, Petitioner filed a motion for new trial, urging in part that the trial court had erred in disallowing those witnesses to give testimony.

Several months after the fact, the Disciplinary Administrator of the State of Kansas gathered certain affidavits from some of the individuals whose testimony had been proffered, which affidavits claimed that the individuals would not give testimony precisely as Petitioner expected they would. Disciplinary proceedings were commenced against Petitioner alleging that Petitioner had intentionally and knowingly made false statement of fact to the court.

On March 13, 14, and 15, 1978, a hearing was conducted before a Panel of the State Board of Law Examiners on that complaint. However, before that hearing, several prehearing conferences had been conducted. During the prehearing conferences, the issue was limited substantially. The issue was formulated as follows:

". . . The issue in this case is as to whether the Respondent made false statements to the

court in his proffered testimony and in his motion for a new trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in paragraphs 1a, 1b and 1c of the complaint. The Panel Chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the Hearing Panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proffered witnesses; . . . ." (February 9, 1978 Pretrial Conference, see 226 Kan. at 375 [Appendix "A"]).

On March 2, 1978 the issue was again stated by the Chairman of the Hearing Panel, further changing the delineation of the issue, as follows:

> ". . . The only issue here is as to whether or not [there was a reasonable basis or probable cause for Fred Phelps to believe that] the witnesses listed in the complaint would have testified in the manner in which Mr. Phelps indicated in his paragraph 1(a), (b), and (c) of his motion for a new

trial. * * *

But, again, the issue is not going to be as to the ultimate truth, but whether or nor Fred Phelps, Sr., had a reasonable basis for making the allegations or the proffers of certain testimony; or whether he willfully made a false statement. * * *

It's really going to boil down to this, did somebody tell Fred Phelps that such and such a person would testify to such and such a way . . . . I don't care whether that person had any basis for what he told Fred Phelps. I am not going into that, as to whether it was true or false, but at this particular time, did he have reason to believe that Dan Turner would testify in this manner if called, and so on down the line."

Prior to this limitation of the issues, Petitioner had filed a witness and exhibit list which was rather lengthy in nature. Such witnesses and anticipated evidence went to other areas, including actual occurrences during the Robinson v. Brady trial, the truth of the proffers made, etc. In addition, evidence and testimony

was going to be offered concerning the occurences which led up to the Robinson v. Brady lawsuit, and the filing thereof. Carolene Brady herself was to be a witness; and evidence was anticipated relative to the credibility of Carolene Brady. All evidence and witnesses which were to be used for other issues believed involved were stricken, and the witness and exhibit list was ordered modified by the Panel, because the Panel restricted the issue as narrowly set forth above.

As already stated, a Panel Hearing was conducted in March of 1978. A Panel Report was issued, *with the only recommendation of discipline being public censure*, large part of which is set forth in the opinion of the Supreme Court of Kansas, 226 Kan. at 376, 377 and 378, see Appendix "A".

Thereafter, the matter was transferred to the Supreme Court of Kansas and the parties filed respective briefs. There was never a hearing on the merits before the Supreme Court of Kansas. The only thing afforded Petitioner before the Supreme Court of Kansas was approximately thirty (30) minutes of oral argument, for all intents and purposes nothing more than appellate arguments. Thereafter, the Supreme Court of Kansas issued an opinion

(Appendix "A"), and the opinion ordered disbarment of this Petitioner. (*It should be noted that the Panel's recommendation was public censure*). A fair reading of the opinion of the Supreme Court of Kansas shows that the disbarment is based in substantial part on what the Supreme Court of Kansas conceived to be "abusive, repetitive, irrelevant" cross-examination of the defendant Carolene Brady; a "classic case of 'badgering' a witness"; and Petitioner having a "personal case". These "findings" were made without the presentation of evidence or chance on behalf of Petitioner Fred Phelps to present rebuttal evidence. The Supreme Court of Kansas also complained that Petitioner filed a motion for a new trial and eventually filed an appeal on behalf of Sherman Frederick Robinson from the jury's verdict for the defendant. For example the Supreme Court of Kansas says: "The jury verdict didn't stop the onslaught of Phelps. He was not satisfied with the hurt, pain, and damage he had visited on Carolene Brady. He filed a motion for a new trial, . . .". In fact, the Supreme Court of Kansas admittedly went beyond the issue framed at the prehearing conference, and reverted back to the original complaint

lodged against this Petitioner. (See 226 Kan. at 379, Appendix "A"). The Supreme Court of Kansas did so to justify its "findings" that this Petitioner in cross examining Carolene Brady and in representing his client had a "personal vendetta . . . against Carolene Brady", and that his examination "was replete with repetition, badgering, innuendo, beligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant". The Supreme Court went on to find that Petitioner's action therein held "Mrs. Brady up to unnecessary public ridicule".

Following the Supreme Court's opinion, Petitioner filed a Complaint in the United States District Court for the District of Kansas, said Complaint being filed July 31, 1979. All Federal Judges in the United States District Court for the District of Kansas disqualified themselves from hearing said action, and the action was thereafter assigned to the Honorable Clarence Brimmer, United States District Judge for the District of Wyoming. Shortly following the filing of said action, a hearing was conducted before The Honorable

Clarence Brimmer, and following the hearing and on August 17, 1979 Judge Brimmer filed an "Order Granting Motion for Preliminary Injunction in Part and Denying the Balance Thereof". The text of said Order, filed August 17, 1979, in the case of Phelps v. The Kansas Supreme Court, et al, Case No. 79-1381 in the United States District Court for the District of Kansas, is set forth and incorporated herein by this reference as Appendix "D", which is attached hereto and incorporated herein. That Order granting injunctive relief is still in effect.

On October 31, 1979, the Honorable Clarence Brimmer filed an Order dismissing Case No. 79-1381. The dismissal was based, in large part, because Petitioner had not exhausted all of his legal remedies. Specifically, Judge Brimmer stated:

> ". . . Plaintiff had the right under 28 U.S.C. § 1257(2) or 28 U.S.C. § 1258(3) [sic] to petition the Supreme Court of the United States to take the case on appeal or upon writ of certiorari. Plaintiff has failed to exhaust his legal remedies. For the above reasons, the relief requested

by the Plaintiff is inappropriate."

F. Review of the Judgment of the State Court (Federal Question Raised)

As the summarization of the "Statement of the Case" illustrates, the procedural background of this case is involved. There have been numerous instances where Petitioner has raised and reserved constitutional challenges. Those instances include but are not necessarily limited to the following:

(1) Petitioner's Motion to be allowed discovery during the disciplinary procedure;

(2) Petitioner's exceptions filed with the Supreme Court of Kansas wherein Petitioner "excepted" to the Panel Report;

(3) Petitioner's Brief before the Supreme Court of Kansas;

(4) Petitioner's oral argument before the Supreme Court of Kansas, through counsel;

(5) Petitioner's filing of Case No. 79-1381 in the United States District Court for the District of Kansas; and,

(6) Petitioner's motion to dismiss or for summary judgment filed both with the Hearing Panel and the Supreme Court, as well as motions to dismiss lodged at the conclusion of the evidence presented, all of which motions challenged the legal and constitutional propriety of the so-called "ethical" violations alleged by the State of Kansas.

In addition, it must be noted that perhaps the most important due process deprivation occurred at the Supreme Court of Kansas level. Specifically, Petitioner is referring to the denial of an opportunity to be fully advised and notified of the charges against him. As already indicated in the "Statement of the Case", the issue before the Hearing Panel was narrowly defined during prehearing procedures. Based on those stated issues, and the narrowing of the issues, Petitioner voluntarily, at the strong suggestion of

the Chairman of the Hearing Panel, modified and amended the witness and exhibit list by substantially pruning that list, and then proceeded during evidentiary hearing to present evidence only on the narrowly defined issue. In fact each time Petitioner would come close to going outside the issue, the State of Kansas would object and the objections would be sustained. Thereafter, the Supreme Court of Kansas, on its own admission (226 Kan. at 379) ignored the narrowly defined issue of the Hearing Panel, and reverted to the broadly worded formal complaint originally filed against Petitioner, in reaching its decision to disbar this Petitioner. Thus, it was not until Petitioner was faced with the opinion of the Supreme Court of Kansas was Petitioner cognizant of the fact that Petitioner was going to be disbarred by the Supreme Court of Kansas on matters totally outside the issues as framed by the Hearing Panel during prehearing conference sessions, and totally outside the issues as defined and enforced during presentation of evidence and arguments. Immediately thereafter, Petitioner raised this federal

constitutional deprivation by the filing of Case No. 79-1381 in the United States District Court for the District of Kansas.

Thus, the federal questions contained herein have been raised throughout these proceedings, timely, and raised both orally and in written form. The constitutional challenges have been overruled at every stage. Petitioner honestly believes that he has raised each federal question as timely as possible and as properly as possible under the circumstances. Therefore, this Court has jurisdiction to review the judgment at issue on a writ of certiorari.

G. Argument for Allowance of Writ

Petitioner understands that this is a petition and not a brief. Petitioner will therefore attempt to be as concise as possible. (See Supreme Court Rule 23[h]). Petitioner believes that numerous substantial constitutional violations have occurred. Not all of these constitutional deprivations will be discussed herein -- only the more blatant.

Before doing so, Petitioner desires to call this Court's attention to a very important document. That document is the Complaint filed July 31, 1979 in the United States District Court for the District of Kansas. The document is excessively bulky, and therefore has not been made an appendix to this Petition. However, pursuant to prior arrangements with the Clerk of this Court, the Court is hereby advised that a full and complete copy of that Complaint, which includes the body of the Complaint, attached Memorandum of Law, and other attached Appendices, is presently lodged

with the Clerk of the United States Supreme Court and is available for reading by the Court. PETITIONER WOULD BEG OF THIS COURT THAT EACH MEMBER OF THIS COURT CAREFULLY READ THAT COMPLAINT IN CASE NO. 79-1381 BEFORE A DETERMINATION IS MADE ON WHETHER OR NOT THIS PETITION FOR WRIT OF CERTIORARI IS GRANTED! That Complaint contains an exhaustive discussion of the various rules relating to discipline of attorneys and the various constitutional violations which Petitioner believes to exist. A reading of that Complaint will both (1) assist the Court in having a better understanding of this litigation; and, (2) assist the Court in having a better understanding of the constitutional questions involved. That Complaint also contains a Memorandum of Law which Petitioner believes fairly summarizes many aspects of the law involved herein.

With respect to specific reasons why this Writ should be allowed, Petitioner submits:

(1) The Honorable Clarence Brimmer has suggested that the proper forum for review is the United States Supreme Court;

(2) The Supreme Court of Kansas has made a decision probably not in accord with applicable decisions of this Court;

(3) The Supreme Court of Kansas has made a decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

These enumerated reasons will be discussed serially:

1. The Honorable Clarence Brimmer has suggested that the proper forum for review is the United States Supreme Court

As already noted, the Honorable Clarence Brimmer recently dismissed Case No. 79-1381, in part, because Petitioner had not petitioned this Court for a Writ of Certiorari. In addition to that portion of Judge Brimmer's opinion already quoted, Judge Brimmer had this to say:

> "As indicated by the Court in Doe v. Pringle, (550 F.2d 596 [10th Cir. 1976]) the only federal court that may review the proceedings of the Kansas Supreme Court is the United States Supreme Court. We do

> not have the authority to review the proceedings of the Kansas Supreme Court in the matter of the disbarment of Fred Phelps. Mayes v. Honn, 542 F.2d 822, 823 (10th Cir. 1977). That the United States Supreme Court will and does review disciplinary proceedings of state supreme courts is shown by the number of such cases recently before the Supreme Court. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), In re Primus, 436 U.S. 411 (1978). All of those proceedings, reached the United States Supreme Court on writ of certiorari from the state courts." (Emphasis supplied).

Petitioner views Judge Brimmer's comments as soliciting this Court to grant a petition for writ of certiorari.

2. The Supreme Court of Kansas has made a decision probably not in accord with applicable decisions of this Court

3. The Supreme Court of Kansas has made a decision which has so far departed from the accepted and

usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision

To intelligently discuss this aspect, one must examine "decisions of this Court" which are applicable. One of the most oft-cited cases of recent vintage is In re Ruffalo, 390 U.S. 544 (1967). The United States Supreme Court, in Ruffalo, supra, discussed the so-called "trap" situation. Petitioner believes that he has been "trap[ped]" by the procedural background of this litigation. Specifically, Petitioner refers to the Panel's narrowing of the issue, Petitioner's reliance upon that narrowing of the issue, and the Supreme Court's subsequent action taken against Petitioner outside the scope of the defined issues. It cannot be questioned but that the Supreme Court of Kansas went outside the issues of the prehearing conference. The Supreme Court of Kansas, at 226 Kan. at 379, after noting that the Panel had declined to make a finding as to whether or not a "personal vendetta" existed, said:

> "The Panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states:
>
> > 'That the motion for new trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact.'"
>
> (226 Kan. at 379). (Emphasis supplied).

The Supreme Court of Kansas straightaway proceeded to find that a violation of DR7-102(A)(1), ABA Code of Ethics, existed. Accordingly, it is clear that the Kansas Supreme Court admits that they have gone outside the issue framed and the issue tried, have instead reverted to the original formal complaint which had been superseded by pretrial proceedings, and based upon that complaint had found violations of a certain Disciplinary Rule which supported a finding of disbarment.

This Court must then look at the actions of the Kansas Supreme Court in light of this Court's solid pronouncements in the Ruffalo case. Mr. Ruffalo had been disbarred by the Supreme Court of Ohio on a charge which he had not known when he went to hearing. In Ruffalo, the charge "for which petitioner stands disbarred was not in the original charges made against him. It was only after both he and Orlando had testified that this additional charge was added". (390 U.S. at 549). Here, it was only after the entire evidentiary hearing had been concluded, after the Panel had made its Report, and after the Supreme Court had the matter under advisement, that additional charges were made against this Petitioner.

In Ruffalo, there was "no de novo hearing before the Court of Appeals". (390 U.S. at 549). Here, while there was supposed to be a "hearing on the merits" before the Supreme Court of Kansas, there was none. During oral arguments before the Supreme Court of Kansas, not one word was raised by the Court and not one question made. No notice or indication was given that the issues would be

expanded, and obviously no opportunity to be heard on those issues was granted. Instead the Supreme Court of Kansas simply took the matter under advisement after oral arguments and thereafter issued their order, making findings upon which no evidence had been presented, and determining issues which were not bona fide.

A portion of the Ruffalo opinion fits precisely with this situation. That portion follows:

> "In the present case petitioner had no notice that his employment of Orlando would be considered a disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F.2d at 462.
>
> These are adversary proceedings of a quasi-criminal nature. C.f. In re Gault, 387 U.S. 1, 33. The charge must be known before the proceedings commence. They

become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no-one knows.

<u>This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."</u> (Emphasis supplied).

The Rules Relating to Discipline of Attorneys in the State of Kansas recognize that, unless otherwise provided, the Rules of Civil Procedure control. Those Rules include K.S.A. 60-216, the counterpart of Rule 16, F.R.Civ.P., relating to pretrial conferences. Indeed the Rules Relating to Discipline of Attorneys by their very text call for prehearing conferences. The purpose of the prehearing conference is to reduce issues

and to fully advise the parties prior to the hearing what issues are involved. That is what was done here. The Supreme Court, in therafter expanding those issues, created a "trap" for Petitioner which in essence disallowed Petitioner to present any evidence or in any way have opportunity for hearing on issues which eventually were used to order disbarment of Petitioner. This absence of fair notice as to the true "reach" of the disciplinary proceedings and as to "the precise nature of the charges" deprived this Petitioner of his procedural due process.

Such constitutional deprivations cannot be allowed, and it is quite clear that <u>only this Court</u> can provide relief. Petitioner attempted to obtain relief from the United States District Court for the District of Kansas, but was instructed to seek relief here. Only this Court remains as an avenue available to this Petitioner for a remedy of the wrong done.

A reading of the opinion of the Supreme Court further reflects that the disbarment was based in large part over what was considered "badgering" of a witness. Without question, this case presents a first in Anglo-Saxon jurisprudence, to wit: disbarment of an attorney because of cross-examination of an adverse party. The Supreme Court also criticizes Petitioner for obtaining affidavits and attempting to file affidavits which supported the proffers made. The Supreme Court of Kansas further, with absolutely no evidence, suggests that this Petitioner was conducting a "personal vendetta" and although technically this Petitioner had a client, the litigation was really that of this Petitioner and not the client. The Supreme Court of Kansas finds that Petitioner's examination of the defendant was "replete with repetition, badgering, innuendo, beligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant", although at all times during the proceedings Carolene Brady was represented by competent counsel, and the examination

took place in front of a trial judge. Nowhere in the record does the trial court find improper cross-examination. Nor were any warnings or reprimands issued to counsel by the trial court judge. Rarely in the record does Carolene Brady's attorney object. Yet the Supreme Court of Kansas, reviewing the cold record months later, in considering matters not even before them, finds the cross-examination to be "badgering". All of these areas and all of these findings were outside the scope of the issues tried.

But beyond that, all of these findings and rulings by the Supreme Court of Kansas go so far beyond the accepted and usual course of judicial proceedings as to require that this Court exercise its power of supervision. Never before has an attorney been disbarred for "badgering" a witness. Never before has an attorney been disbarred for conducting a "personal vendetta". Etcetera. Petitioner feels that a fair reading of the opinion of the Supreme Court of Kansas by this Court will convince this Court of the necessity of supervision.

In addition, these areas present substantial questions of First Amendment rights, specifically the right of Petitioner to speak and practice a profession (i.e.,

examining witnesses, etc.) and to associate (i.e., obtain affidavits, etc.). These First Amendment rights of the Petitioner have been denied by the Supreme Court of Kansas.

There is another area where Petitioner believes the Supreme Court of Kansas has acted in a fashion not in accord with applicable decisions of this Court and in a fashion so far removed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. That area has to do with the apparent finding by the Supreme Court of Kansas that Petitioner did not believe the proffers made. In fact, never has there been a finding that the proffers were not true. Nor has there been a finding that Petitioner did not in good faith actually himself believe that the proffers were true. It is totally improper and patently unfair to disallow an attorney who has proffered testimony to put the witnesses on the witness stand at the time the proffer is made, on the one hand, and to thereafter many months after the fact allow a disciplinary administrator,

with inquisitional-type powers, to attempt to prove that those witnesses would not at the time the proffers were made have had such testimony. The only true question which should have been addressed was whether or not this Petitioner knew or believed that the proffers were false at the time that they were made. If Petitioner believed the proffers to be true, as the record abundantly showed, it is not an ethical matter that perhaps another attorney under similar circumstances would not have believed the proffers. There was never a finding that Petitioner did not believe the proffers. The essence of the findings of both the Panel and the Supreme Court of Kansas was that Petitioner should not have believed the proffers, or stated another way, that a "reasonable lawyer" under similar circumstances would have not believed the proffers. This, of course, is the language of negligence -- not intentional ethical violations or misstatements.

Further, the Supreme Court of Kansas found a Rule 11 (K.S.A. 60-211) violation, although there was never a finding made of any falsity. Before Rule 11 violations

can even be discussed, there has to be a determination made in the forum where statements are made that those statements are false. Miller v. Schweickart, 413 F.Supp. 1059 (S.D.N.Y. 1976). See Risinger, D. Michael, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L.R. 1 (1976). As the case law and the just-cited law review article reveal, and indeed the very text of Rule 11 itself reveals, the sine que non of a Rule 11 violation is a finding of falsity. The Panel during the disciplinary hearing expressly held that the issue was not whether or not the proffers were true. Nor was Petitioner ever allowed to offer evidence on the truthfulness of the information proffered. How in the world, then, could there be a finding of falsity made to support a so-called Rule 11 violation? This is just another example of the Supreme Court of Kansas' violating the procedural due process rights of this Petitioner.

In addition, this Court should take note of the fact that there has never (to this writer's knowledge) been a case

or a proceeding where an attorney was disbarred pursuant to Rule 11, even assuming that it had been shown that allegations made by an attorney were false, in the forum where those allegations were made. Instead, the case law under Rule 11 deals with "striking" pleadings which are false. Before pleadings can be stricken as false they have to be found to be false or unfounded. No such finding was ever made here, and in fact no effort was ever made to strike the motion for new trial from the file.

Finally, with respect to the proffers, Petitioner submits that the action taken by the Supreme Court of Kansas is in direct contradiction of this Court's ruling in Scottland County v. Hill, 112 U.S. 183, 5 S.Ct. 93, 28 L.Ed. 692. That case dealt with the question of proffers. The Court said in that opinion:

> "If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness and upon some attempt to make the proof before it rejects the offer;

> but if it does reject it and allows a bill of exceptions which shows that the offer was actually made and refused and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made and govern itself accordingly."

Indeed, the Robinson v. Brady litigation was appealed to the Kansas Court of Appeals, and the Kansas Court of Appeals presumptively assumed that the proffers were accurate in determining that appeal. It therefore was manifestly improper for the Supreme Court of Kansas, in a collateral proceeding, to attempt to establish otherwise. In so doing, this Court's holding in Scottland County was violated, and again the usual course of judicial procedure was ignored.

This Petitioner has been ordered disbarred from state court practice where no clear ethical violation was even clearly charged against him, let alone proven. The most that has been charged and proven is that a reasonable lawyer similarly situated, in retrospect, would not have made certain proffers which this Petitioner made. Such a judgment should not in reason be allowed to stand.

H. Conclusion

The Rules Relating to Discipline of Attorneys, as adopted by the Kansas Supreme Court, and as applied to this Petitioner, violate the United States Constitution. They permitted the filing of a secret complaint against this Petitioner; permitted a secret hearing to be held on that complaint, without opportunity for this Petitioner to have a public hearing on that complaint; and permitted the Supreme Court of Kansas to order disbarment of this Petitioner as a result of that complaint without Petitioner being given notice of the charges against him, without Petitioner being given an opportunity to present evidence on the charges and to cross-examine those complaining against him on the charges, without discovery, without fair notice of the issues, without opportunity to be fully heard upon the issues because of the want of notice, without any hearing "on the merits" before the Supreme Court of Kansas. Such conduct constituted a denial of this Petitioner's procedural due process, substantive due process, equal protection,

and freedom of speech and association.

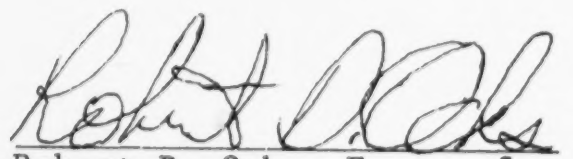
It clearly appears that the procedure effected by the Kansas Supreme Court was so lacking in notice and opportunity to be heard as to constitute a deprivation of due process. It further clearly appears that there was such an infirmity of proof establishing any alleged misconduct such as to cause this Court to have the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion reached by the Supreme Court of Kansas. It further clearly appears that the imposition of the discipline imposed by the Kansas Supreme Court constitutes a grave injustice.

The proceedings have been marked throughout by constitutional infirmities. The chief constitutional infirmity appeared during the proceedings before the Supreme Court of Kansas.

Petitioner again would urge the Court to carefully consider the Complaint lodged with the Clerk of this Court, in Case No. 79-1381. Petitioner further

would sincerely urge this Court to give this Petition for Writ of Certiorari serious and sober consideration because of the grave nature of the violations involved. This Petition, of course, only summarizes the principle areas of concern. The Court will, after granting this Petition, have an opportunity to review the entire record in detail. Petitioner is convinced that this Court realizes the substantial questions at issue, and that this Court will grant this Petition for Writ of Certiorari. Petitioner so prays.

Respecfully submitted,



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No. 50,834

STATE OF KANSAS, *Petitioner*, v. FRED W. PHELPS, SR., *Respondent*.

Disciplinary Proceeding

ORDER OF DISBARMENT

ATTORNEYS—*Disciplinary Proceeding—Disbarment.*

Philip A. Harley, disciplinary counsel, argued the cause and was on the brief for the petitioner.

A. J. "Jack" Focht, of Wichita, argued the cause, and *Fred W. Phelps, Jr.*, of Topeka, and *F. G. Manzanares*, of Topeka, were with him on the brief for the respondent.

Per Curiam: On March 13, 14 and 15, 1978, a panel of the State Board of Law Examiners held a hearing on a complaint against respondent, Fred W. Phelps, Sr. It filed its report, findings and recommendations on February 12, 1979. The action is before this court pursuant to Supreme Court Rule 212 (224 Kan. lxxxvi-lxxxvii; old rule No. 213, 223 Kan. lxxxiv).

The facts out of which respondent's violations arose are as follows: On May 31, 1974, a preliminary hearing was held in Division One of the Magistrate Court of Shawnee County, Kansas, before Judge Allan A. Hazlett, wherein the State of Kansas was plaintiff and Sherman Robinson was the defendant charged with a felony and represented by R. W. Niederhauser, attorney. Carolene Brady was the court reporter who took the testimony at the hearing.

On July 15, 1974, Mr. Niederhauser attempted to call Carolene Brady to notify her he needed a transcription of the testimony at the Robinson preliminary hearing, but was informed Brady was on vacation and would not return until August 1, 1974. In the meantime, R. W. Niederhauser had employed Fred W. Phelps, Sr. to try the Robinson case.

On July 31, 1974, Carolene Brady returned from her vacation and on August 5, 1974, she was contacted by Niederhauser about transcribing the testimony from the Robinson preliminary hearing. Mrs. Brady advised Mr. Niederhauser at that time that she was working on a transcript for Russell Shultz of Wichita and she would not be able to provide the Robinson transcript by the date Niederhauser desired it, which was August 9, 1974. Brady told Niederhauser if he could obtain a continuance of the trial she would try to complete the transcript by August 13, 1974, and

APPENDIX "A"

would call him on August 12, 1974 and report. The continuance to August 13 was obtained.

On August 12, 1974, Brady tried to contact Niederhauser to report she had the testimony dictated onto tape but she couldn't find a typist. Niederhauser was not available when she telephoned so she left word for him to return her call. The call was never returned.

Later on August 12, 1974, Carolene Brady received a telephone call from a female who said she was calling from Phelps' office advising her she'd better have the Robinson transcript ready that day "or else." The person was later identified as Fred Phelps' daughter, Shirley.

Brady next called Fred Phelps, Sr. to notify him, since she couldn't find Niederhauser, that she would be unable to get the testimony typed on time. Phelps responded angrily and told her he had wanted to sue her for a long time. Thereafter, Phelps, on behalf of Robinson, filed a mandamus action in Shawnee County District Court, case No. 125695, and obtained an emergency court order for Carolene Brady to produce the transcribed testimony by 9:00 P.M. August 13, 1974, or to appear August 13, 1974, at 1:30 P.M. and show cause to the contrary. Brady found a Ms. Laird, who picked up the tapes around 4:00 P.M. August 12, 1974, and typed the transcript, taking some 6 hours to complete it. The transcription was delivered to the court at 8:30 A.M. August 13, 1974. Brady appeared at 1:30 P.M. to show cause but no action was taken. Sherman Robinson went to trial on August 14, 1974, and was acquitted.

In spite of the successful termination of the criminal action which set this sequence of events in motion, Robinson or his attorney, Phelps, continued to pursue the mandamus action and, in addition, filed a damage suit against Carolene Brady for fraud and misrepresentation, designated as case No. 125742, in the District Court of Shawnee County, Kansas. The petitioner prayed for $2,000.00 actual damages and $20,000.00 punitive damages.

Case No. 125742, the damage suit, was set for trial December 16, 1976, before a jury of six, lasting 8 days. It resulted in a verdict for Carolene Brady. Case No. 125695, the mandamus action, was tried at the same time but to the court. It also resulted in a verdict for Brady.

In both trials, Fred Phelps, Sr. represented Sherman Robinson

and tried the case. Fred Phelps, Jr. assisted. The case appeared to be Phelps' personal case. He called the defendant, Carolene Brady, as his witness, had her declared hostile, then proceeded to cross-examine her for 3 or 4 full days. The record discloses that his cross-examination was abusive, repetitive, irrelevant, and represented a classic case of "badgering" a witness. Then he had the temerity to complain that Brady cried in the presence of the jury. Throughout the trial, Phelps made attempt after attempt to adduce testimony concerning Carolene Brady's reputation for truth and veracity, her reputation for competency, the falsification of her income tax return and her morality, or lack thereof.

It is clear from our examination of the record and transcripts in that case that the trial was a personal vendetta by Fred Phelps, Sr. against Carolene Brady. The jury verdict didn't stop the onslaught of Phelps. He was not satisfied with the hurt, pain and damage he had visited on Carolene Brady. He filed a motion for a new trial, the controversial part of which is herewith set out in full:

"1. Erroneous rulings by the Court as follows:

(a) Rejecting the proffered testimony of R. W. Niederhauser, F. G. Manzanares, Jess Danner and Richard Waters as follows: That Messrs. Niederhauser and Manzanares qualified as practicing attorneys to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. With regard to the testimony of Jess Danner and Richard Waters, that they qualified as certified court reporters to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. Rejecting Niederhauser July 15 and August 1 telephone conversations with one identifying herself as speaking for defendant.

(b) In rejecting the proffered testimony of Ralph J. Hiett, B. L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, as follows: That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation; and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed as the court reporter

for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under the law, the defendant Brady repeatedly 'leaked' knowledge of such proceedings to certain of those being investigated by such grand jury and who were later indicted by such grand jury including but not limited to: Morris 'Pete' Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called 'architectural kickback case'; and further included but not limited to the conduct of defendant in 'leaking' two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of Kathy Fitzgerald and Karen Kennedy, which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duty. Rejecting Appendix 'C' in connection with such proffer.

(c) In rejecting the proffered testimony of Patrick Brady, former husband of the defendant Brady, to the effect that the three children of the defendant, Mike, Karen and Laurie, were in fact living with him (Patrick Brady) and away from the defendant Brady during the years 1974 and 1975, the very years when the defendant Brady swore on her oath to the United States government and the State of Kansas on income tax returns admitted as evidence in this case that each of said three children were in fact living with the defendant Brady in 1974 and 1975 and that the defendant Brady was therefore entitled to claim each of said three children as her personal exemptions for said years, and further, that custody of the son of the parties, Mike, changed from the defendant Brady to Patrick Brady in 1973, and since that time, the son Mike has been living with Patrick rather than the defendant, and that the only remaining minor child of the parties, Laurie, is now in the custody of Patrick Brady and all in contradiction to the sworn testimony of the defendant Brady and constituting substantial impeachment of the defendant Brady and having strong probative value in the instant case going to the critical question of whether Mrs. Brady or Mr. Niederhauser was telling the truth on vital questions of evidence."

The defendant, Carolene Brady, responded to Phelps' motion for a new trial by obtaining and filing affidavits from eight of the witnesses, listed by Phelps, showing they would not testify as Phelps indicated they would. The motion for a new trial was denied and the case was appealed to the Court of Appeals where the judgment of the trial court was affirmed February 17, 1978.

After Phelps had appealed *Robinson v. Brady* to the Court of Appeals, he filed documents to the trial court entitled, "Plaintiff's Reply Affidavits to Defendant's Post-Trial and Post-Appeal Affidavits." The content of the affidavits was so scurrilous that the Court of Appeals ordered its copies expunged as of the date of the opinion and the trial court later expunged its copies from the

record on November 22, 1978. In spite of the court's order of expungement, Phelps attached two of these affidavits to the reply brief filed with this court in the present case, thus successfully making them public documents. These affidavits cast reflections on Carolene Brady's character, wholly outside the issues of either the mandamus action or the fraud and misrepresentation case.

The facts of the case against Carolene Brady were brought to the attention of Arno Windscheffel, the disciplinary administrator, and a formal complaint was filed against Fred W. Phelps, Sr., on November 8, 1977. The complaint alleges the respondent made his proffers of testimony during the *Robinson v. Brady* trial and filed a motion for new trial asserting certain individuals would testify in a certain way as to Carolene Brady's reputation for truth and veracity, for competency and reckless conduct, attitude toward her oath and obligation and for keeping a secret. Further, the complaint noted the affidavits filed by the eight witnesses stating they would not testify as asserted in the motion for new trial. Finally, the complaint alleged Phelps had "[N]o reasonable basis for asserting that the . . . named persons would testify in the manner in which he contends . . . some of the named individuals had told Phelps that they would not so testify."

Respondent answered denying the allegations of the complaint that he made proffers of testimony which were not true and correct to the best of his knowledge, belief and understanding.

A pretrial conference was held February 9, 1978, where the issues were defined as follows:

"3. The panel chairman then states it is his opinion and he rules that the issue in this case is as to whether the Respondent made false statements to the court in his proffered testimony and in his Motion for a New Trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in Paragraphs 1a, 1b and 1c of the complaint. The panel chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the hearing panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proffered witnesses; more particularly the issues will be as to whether or not the Respondent violated

1. His oath as an attorney
2. DR1-102A4 - 'Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation'
3. Did he violate DR1-102A5 - 'Engage in Conduct that is Prejudicial to the Administration of Justice' and
4. Did he violate DR7-102A5 - 'Knowingly Make False Statement of Fact or Law' and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?"

The disciplinary hearing before the panel was held March 13, 14 and 15, 1978, with trial briefs submitted June 1, 1978. The panel made the following findings:

"The Respondent seeks to vindicate his written Motion for a New Trial by an interpretation of the motion to the effect that not all persons named would testify to all the proffers (TR-527) but that some would testify to each element. The Panel concludes this is a strained construction and interpretation of the writing. Had the Respondent so intended when he wrote the motion, he could easily have used language that would have expressly set forth what each witness would offer in testimony. The Respondent elected to 'lump' the names and proffers and the posthumous explanation is not accepted by the Panel.

"The Panel recognizes that in the trial of a case things may be said inadvertently. Also, we note that the reading of the transcript of the trial of Robinson v. Brady makes it difficult to get the full or true meaning of statements by counsel and of ruling by the court. However, the written Motion for a New Trial is of a different character. Here the Respondent was in the quiet of his office; he has spoken with the witness and has been advised by them as to what they will and will not testify; he has opportunity to confer with his co-counsel and with his investigator and informant. At that time he could have and should have taken steps to make certain that his 'proffers' were in fact correct. This would not have been difficult. For example, the Respondent had himself talked to several of the named witnesses and had been personally advised by certain of the witnesses that they could not and would not testify in the manner or to the things set forth in the motion.

"An inquiry to the investigator would have disclosed that (1) he made no written reports of his interviews and that some of the interviews were conducted in 1973 (Tr-418). (2) That Kathleen Fitzgerald had no direct information as to who may have 'leaked' testimony of a secret nature (Tr-419-420). (3) That the informant and investigator had never personally talked to Patrick Brady or Joyce (Tr-423) but he did talk to Joyce by phone and Joyce declined to talk about the reputation of Brady (Tr-424). (4) That he last talked to Joyce in 1973 (Tr-425) and to Brewster in 1973 (Tr-425).

"At the meeting of Respondent and his co-counsel on or about January 2, 1977, when the Motion for a New Trial was prepared, the Respondent knew that certain of the witnesses would not testify as orally proffered, but he made no mention of that fact and in fact prepared and signed the motion with that knowledge in mind.

"'Tr-430 (testimony relating to the preparation of the Motion for a New Trial)

'Q. At that time did Mr. Phelps advise you or say anything to you or Mr. Niederhauser or anything that you heard that he had information that Pringle, Connolly, Brewster, Turner and Brady would not so testify as was stated in here?

A. (By Hiett) No.'

"A lawyer is an officer of the court and owes a duty to the court and to his client. DR 1-102 states:

'A lawyer shall not

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'

"The Panel finds that the Respondent knew that the witnesses named in the Motion for a New Trial would not each testify as the motion states. This information was made known to the Respondent personally by some of the named witnesses. Further, because of the Respondent's personal involvement in other prior cases and investigations, the Respondent, as an attorney, had a duty to check his sources of information, the accuracy of the information, and the possible prejudice of the informant. The Respondent ignored the warning signals and his own personal knowledge and the Panel finds that his conduct in signing and filing the Motion for a New Trial constitutes a violation of DR 1-102(A)(4) and also a violation of DR 1-102(A)(5) in that he did engage in conduct that is prejudicial to the administration of justice.

"A lawyer is an advocate and he has a duty to represent his client zealously. But, he must do so within the bounds of the law. DR 7-102 states:

'A - In his representation of a client, a lawyer shall not

(5) Knowingly make false statements of law or fact.'

"The Panel finds that the Respondent had personal knowledge prior to the time the oral proffers were made and prior to the time the written Motion was filed that some or all of the named witnesses would not testify in the manner and to the things as stated in the proffers and in the Motion for a New Trial. It is apparent to the Panel that the Respondent was relying on innuendos and deductions and the hope that the witnesses, if called to the stand, might change their testimony. But the Respondent does not so state in his proffers or in the motion. The Respondent chose to ignore the direct testimony he had personally received and to accept the statements of his investigator and informant. The Panel finds that the Respondent did knowingly make false statements of fact and did violate DR 7-102(A)(5).

"The Panel further finds that when the Respondent signed the Motion for a New Trial, he knew of his own knowledge that certain of the statements therein made were not true and that the witnesses would not so testify and that by signing the pleading he thereby violated KSA 60-211, and that the signing of the Motion by the Respondent was a wilful act.

"Beyond these specific findings, the testimony in this case and the reference to prior related cases disclose a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his client and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon. We do not make such a specific finding. However, we do call the attention of the Respondent to DR 7-102 (a) [*sic*] (1):

'In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows that such action would serve merely to harass or maliciously injure another.'

We merely suggest to the Respondent that he might well take a critical look at his tactics and policy and procedures in his utilization of his license as a lawyer and answer truthfully to himself the question - 'Am I fulfilling my duty as a lawyer?'

"The Panel has received and has reviewed and studied the briefs prepared and filed by counsel for the State and counsel for the Respondent. They are most

helpful. Unfortunately, there are not many decided cases upon the points we are now considering. Most of the cases deal with the application of Federal Rule 11, our KSA 60-211. The case of Miller v. Schweickart, 413F Supp (1059) (1061) (USDC-SDNY-1976) is cited by both counsel and thoroughly dissected. It involved a complaint in a class action and the Court said

'Lawyers have a responsibility before subscribing their name to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made on information and belief — Unverified hearsay based on rumor is not sufficient upon which to subject one to the burdens of complex litigation and heavy legal costs. (underlining added)'

We recognize this case is not directly in point for it refers to a complaint and not a motion or subsidiary pleading. But, we are of the opinion the wording is peculiarly applicable to this case. The Respondent contends he did have a reasonable basis for his allegations, namely a co-counsel, his investigator and informant, and a third party. But, the inferences and innuendos and conclusions of those parties had been directly controverted by certain of the witnesses named by the Respondent in his Motion for a New Trial. The Respondent chose to ignore the direct negation by the witness, of which he had personal knowledge, and based his affidavit upon the erroneous information given to him by those whom he chose to believe.

"We point out that KSA 60-211, which refers to pleadings is made applicable to all 'motions and other papers' by KSA 60-207(B). See also Fed Rule 11 and 7 and U.S. ex rel Foster Wheeler Corp v. American Surety Co. 25 F Supp 225 (EDNY-1938) and Wright & Miller Fed Practice & Procedure, Vol 5, Par 1332.

"And in the article 'Honesty in Pleading and its Enforcement' by D. Michael Risinger, Minnesota Law Review - 1976, Vol 61, Page 1 of his conclusion, the author states with respect to Rule 11 (KSA 60-211)

'Rule 11 seeks to obtain honesty in pleadings by requiring the signature of an attorney and by requiring that there be good ground to support the document signed. Good ground cannot exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document. (underlining added)'

"We cannot accept the Respondent's argument of 'reasonable basis' when certain of the named witnesses had personally advised the Respondent that they had no knowledge or information on the matters sought to be elicited or that they would not testify as stated by the Respondent in the affidavit.

"We have also considered Respondent's procedural objections and contentions. In our opinion the issue is not whether the trial court was misled but rather is whether the Respondent knowingly made false statements to the Court in his Motion for a New Trial, and we have found from the evidence that the Respondent did knowingly make such false statements."

We have said a disciplinary action is more serious than a civil action, *State v. Johnson*, 219 Kan. 160, 546 P.2d 1320 (1976), and charges must be established by substantial, clear, convincing and satisfactory evidence. *State v. Hoover*, 223 Kan. 385, 574 P.2d 1377 (1978); *State v. Johnson*, 219 Kan. 160. In addition, it is well

established the Board's findings and recommendations are advisory only and are not binding on the court. *State v. Johnson; In re Phelps,* 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied* 397 U.S. 916 (1970). This court has the duty in a disciplinary action to examine the evidence and determine for ourselves the judgment to be entered. *State v. Klassen,* 207 Kan. 414, 485 P.2d 1295 (1971).

We have carefully and painstakingly reviewed the voluminous transcripts and exhibits and conclude there is clear and convincing evidence to support the panel's finding that the respondent violated: DR 1-102(A)(4); DR 1-102(A)(5); DR 7-102(A)(5); and K.S.A. 60-211.

In addition, a study of the transcripts, particularly that of the trial of *Robinson v. Brady,* convinces us that Fred W. Phelps, Sr. meant it when he told Carolene Brady he had wanted to sue her for a long time. The trial became an exhibition of a personal vendetta by Phelps against Carolene Brady. His examination was replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant. We note the panel's discussion of DR 7-102(A)(1) and its observation that the record and testimony show "a course of conduct by the Respondent that indicates the Respondent *may* have ceased to be an advocate for his client and *may* be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon." (Emphasis added.) The panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states: "That the Motion for New Trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact." We have examined the record and transcripts from *Robinson v. Brady,* which were made exhibits by the panel and are properly before this court as part of the record in the disciplinary case. This record unquestionably supports a finding that Phelps' action in filing the motion for new trial attempted to hold Mrs. Brady up to unnecessary public ridicule. Additionally, we find the entire record before us clearly supports a violation of DR 7-102(A)(1).

Respondent claims he was denied due process when the panel denied his motion for discovery. We find the panel's ruling

correct. The panel hearing is a type of discovery, with lenient rules to permit respondent to present any defense he might have to the complaint. Respondent relies upon *Brotsky v. State Bar,* 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962), to support his claim. This case, however, recognizes the existence of a California state statute allowing discovery in this type of proceeding. See Cal. Bus. & Prof. Code § 6085 (West). Kansas law is distinguishable because we have no statutory requirements for discovery under such circumstances. Additionally, we note with approval a recent Indiana case holding denial of discovery in a disciplinary proceeding is not an unconstitutional denial of due process. *Matter of Murray,* 362 N.E.2d 128 (Ind. 1977). We find the respondent had proper notice of the nature and extent of the complaint and that the hearing was fairly and properly conducted by the panel.

Respondent argues his motion for a new trial and allegations therein referring to proffered evidence are no more than a normal proffer. We do not agree. An oral proffer during the course of a trial is made for the purpose of preserving the record. K.S.A. 60-243(*c*). The reference to witnesses and their testimony in a motion for a new trial is an attorney's representation to the court that a new trial should be granted because of the quality of proof available. The motion is prepared in the attorney's office and should be carefully and studiously drafted. It is an attorney's representation to the court and is contemplated by K.S.A. 60-211.

The final determination for the court is the proper discipline for respondent's violations of the Code of Professional Responsibility. In this regard, we note it is proper to consider an attorney's previous record concerning professional conduct. *State ex rel. Okl. Bar Ass'n v. Hensley,* 560 P.2d 567 (Okla. 1977). See also *Selznick v. State Bar,* 16 Cal. 3d 704, 547 P.2d 1388, 129 Cal. Rptr. 108 (1976). Phelps was suspended from practicing law for a period of two years for unprofessional conduct in 1969. *In re Phelps,* 204 Kan. 16. The seriousness of the present case coupled with his previous record leads this court to the conclusion that respondent has little regard for the ethics of his profession. In his attorney's oath, Fred W. Phelps, Sr. swore as follows:

"You do solemnly swear that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give

your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all inferior courts of the State of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God." Rule No. 702 (*h*) (224 Kan. cxxxviii).

He has disregarded that oath, and violated the Code of Professional Responsibility and K.S.A. 60-211. The practice of law is a privilege rather than a right and by his conduct, respondent has forfeited his privilege. We find he should be disciplined by disbarment and assessed the costs of this action.

BY ORDER OF THE COURT, dated this 20th day of July, 1979.

RULE NO. 7.06

Rehearing of Modification in Supreme Court

(a) A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing.

(b) If no motion for rehearing is filed or upon denial of a motion for rehearing, the Clerk of the Appellate Courts shall, unless the Court otherwise orders, issue a mandate on the decision of the Supreme Court to the District Court together with a copy of the opinion.

APPENDIX "B"

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Petitioner,
v. Case No. 50,834
FRED W. PHELPS, SR.,
Respondent.

You are hereby notified of the following action taken in the above entitled case:

Amended Motion for Stay.

The Motion to Stay the Order of Disbarment, entered July 20, 1979, is denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date: August 30, 1979

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FRED W. PHELPS, SR.,
Plaintiff,
vs. NO. 79-1381
THE KANSAS SUPREME COURT, THE HONORABLE ALFRED G. SCHROEDER, THE HONORABLE ALEX M. FROMME, THE HONORABLE DAVID PRAGER, THE HONORABLE ROBERT H. MILLER, THE HONORABLE RICHARD M. HOLMES, THE HONORABLE KAY McFARLAND, and THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court, and THE STATE OF KANSAS,
Defendants.

FILED
AUG 17 1979
ARTHUR G. JOHNSON, Clerk
By H. Hope, Deputy
[Stamp]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION IN PART AND DENYING THE BALANCE THEREOF

The Application for Preliminary Injunctive Relief, filed herein by the Plaintiff,

APPENDIX "D"

coming on to be heard on August 10, 1979, Plaintiff appearing in person and by his attorneys, Charles S. Fisher, Jr., Esq., of Fisher, Ralston, Ochs, & Heck, and Herbert B. Newberg, Esq., and the Defendants appearing by their attorneys, Bruce E. Miller, Esq., Deputy Attorney General of the State of Kansas, and Philip A. Harley, Esq., Special Assistant Attorney General of the State of Kansas, and the Court having heard the arguments of counsel and being fully advised in the premises finds that said application should be allowed as to the requirement of Rule 219 of the Rules of the Supreme Court of Kansas that an attorney disbarred or suspended from the practice of law shall forthwith notify each client or person represented by him and the Court or administrative body in pending matters of his inability to undertake further representation of each client and in such matter and to notify each client to obtain other counsel in such matters, and as to all other matters therein should be disallowed, except as regards the Plaintiff's license to practice law before the federal courts of the District

of Kansas, and the Court having found that the Plaintiff may suffer irreparable harm and injury if enforcement of said Rule is not stayed during the pendency of this action, in that said Rule would require notice to be given to each client of the firm of which Plaintiff is a member and may result in a loss of legal business to the other members of said firm, and it further appearing that the Supreme Court of Kansas has not had an opportunity to rule upon the Plaintiff's Motion for a Stay of its Mandate; now, therefore, it is

ORDERED that the Plaintiff, Fred A. [sic] Phelps, sometimes known as Fred W. Phelps, Sr., be and he hereby is relieved, during the pendency of this action from compliance with Rule 219 of the Supreme Court of Kansas and that enforcement of the Mandate of said Court be suspended in that regard only during the pendency of this action, or until further order of this Court; and that the Plaintiff's Application for Preliminary Injunctive Relief be denied in all other particulars; it is further

ORDERED that during the pendency

of this action no proceedings in the United States District Court of Kansas be undertaken toward disbarment of Plaintiff from the federal courts, pending the outcome of this litigation.

Dated this 10th day of August, 1979.

/s/ Clarence E. Brimmer
U.S. DISTRICT JUDGE - Presiding

In the Supreme Court of the United States

No. 79-732

FRED W. PHELPS, SR.,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

PHILIP A. HARLEY of
SCOTT, QUINLAN & HECHT
3301 Van Buren
Topeka, Kansas 66611
(913) 267-0040
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

No. 79-732

FRED W. PHELPS, SR.,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

COMES NOW, the Respondent by and through their counsel, Roger N. Walter, Disciplinary Counsel for the State of Kansas and Philip A. Harley, Special Assistant to the Disciplinary Counsel, and for their response to the submitted Petition for a Writ of Certiorari present the following brief in opposition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts those provisions cited by Petitioner.

STATEMENT OF THE CASE

A. Statement of Facts.

Petitioner's statement of facts contains some errors; therefore Respondent offers a separate statement of facts.

Petitioner, Fred W. Phelps, Sr., was an attorney licensed to practice law in the State of Kansas prior to July 20, 1979. In 1975 and 1976 Fred W. Phelps, Sr., represented one, Sherman Robinson. Mr. Robinson had filed suit against Carolene Brady, a court reporter, wherein he alleged that Ms. Brady had failed to timely prepare and deliver a transcript. The dispute was eventually tried to a jury. (For a more detailed examination of *Robinson v. Brady* see Kansas Supreme Court opinion attached as Appendix "A".)

During the course of the trial Fred Phelps, Sr., made serious allegations, in the form of proffers, concerning Ms. Brady's reputation and alleged past improprieties. These were repeated by Fred W. Phelps, Sr., in a Motion for New Trial filed by him after the jury returned a defendant's verdict. Fred W. Phelps, Sr., alleged that certain individuals would testify in a certain manner if allowed to take the stand. Upon inquiry by defendant's counsel, it was discovered that many of the proposed witnesses would not testify in the manner indicated by Fred W. Phelps, Sr.

These facts were brought to the attention of the Disciplinary Administrator of the Kansas Supreme Court, an official charged with overseeing the attorney disciplinary procedures in the State of Kansas. After investigation and review by a panel of three attorneys, the matter was referred for an investigative hearing pursuant to the rules of the Kansas Supreme Court. A hearing was held in March, 1978. The hearing panel then submitted its proposed findings and recommended discipline to the Kansas Supreme Court in February, 1979.

Pursuant to Kansas Supreme Court rules, the Respondent in a disciplinary matter is given a choice of either accepting the factual findings of the hearing panel or of taking exception and having the Supreme Court determine the facts from its review of the record. In either case, the Kansas Supreme Court ultimately decides on the appropriate discipline. Fred W. Phelps, Sr., chose to take exception to the hearing panel's factual findings and thus invited the Kansas Supreme Court to review the record and make its own conclusions, which the Court did after both sides filed briefs and made public oral arguments to the Court.

On July 20, 1979, the Kansas Supreme Court filed its opinion and order in the case of *State v. Phelps*. Because that date becomes crucially important, a copy of the Clerk of the Kansas Supreme Court's Docket Sheet is included in this response as Appendix "A".

In August, 1979, Fred W. Phelps, Sr., attepted to secure relief from the Order of Disbarment by filing a class action in the United States District Court for the District of Kansas. That case has now been dismissed. *Phelps v. Kansas Supreme Court, et al.*, No. 79-1381, United States District Court for the District of Kansas. (Appendix "B"). A motion for reconsideration was filed by Mr. Phelps and denied. (Appendix "C"). However, Respondent strongly disagrees that the federal judge in any manner indicated the United States Supreme Court should grant a Writ of Certiorari in this case. The federal judge merely indicated to Fred W. Phelps, Sr., that this was the only Court that had proper jurisdiction, nothing more.

B. How Federal Questions Arose.

As previously noted, Fred W. Phelps, Sr., was disbarred by order of the Kansas Supreme Court after exhaustive legal proceedings. During the course of those proceedings Fred W. Phelps, Sr., continuously raised objection to various procedural practices utilized by the Kansas Supreme Court and the hearing panels. The Kansas Supreme Court consistently overruled the objections and ultimately entered its order of disbarment. Fred W. Phelps, Sr., complains the disciplinary rules and procedures created by the Kansas Supreme Court are inherently unconstitutional and that the particular procedure afforded him was constitutionally improper.

REASONS FOR NOT GRANTING CERTIORARI

I. Petitioner Has Filed the Petition for Writ of Certiorari Out of Time in That More Than Ninety Days Elapsed Between the Entry of Judgment by the Supreme Court of Kansas and the Filing of This Petition.

Applicable federal statutes provide that a litigant seeking review of a state court decision must file a Petition for Writ of Certiorari within ninety days of the entry of judgment by the state court. 28 U.S.C. §2101(c). Petitioner in this case has failed to comply with that jurisdictional requirement and therefore, the Court should deny the Petition. *FTC v. Minneapolis - Honeywell Regulator Co.*, 344 U.S. 206 (1952); *Bradford Electric Light Co., Inc. v. Clapper,* N.H., 284 U.S. 221 (1931); *FAC v. Colgate - Palmolive Co.*, 380 U.S. 374 (1965).

Judgment was entered by the Clerk of the Kansas Supreme Court on July 20, 1979. At no time did Fred W. Phelps, Sr., request the Court to modify its opinion or

alter its judgment. In fact, Fred W. Phelps, Sr., acted as if the order was final in that he commenced a federal court action attacking the state court decision on July 31, 1979. *Phelps v. The Kansas Supreme Court, et al.*, No. 79-1381 United States District Court for the District of Kansas. The records of the Clerk of the Kansas Supreme Court indicate the mandate of the Supreme Court was also issued on July 20, 1979. (Appendix "A"). While Fred W. Phelps, Sr., did file a Motion to Stay on August 9, 1979, that Motion was never granted. The Motion to Stay had nothing whatsoever to do with merits of the Kansas Supreme Court decision but rather merely asked the Kansas court to await the federal court opinion and judgment. Thus, at no time did Petitioner ever make a serious effort to ask the Kansas Supreme Court to reconsider its opinion of July 20, 1979, but at all times acted as if the opinion was final.

Fred W. Phelps, Sr., filed this Petition for Writ of Certiorari on November 7, 1979. One hundred and ten (110) days elapsed between the entry of judgment by the Kansas Supreme Court and the filing of this Petition. Clearly, Petitioner has failed to comply with the time requirements of 28 U.S.C. §2101(c) and this Petition should be denied.

II. Petitioner's Allegations That the Kansas Supreme Court Rules Relating to Discipline Violate the Kansas Constitution Are Frivolous and Petitioner Presents No Compelling Issue of National Importance or Application for the Court's Determination.

Petitioners seeking a Writ of Certiorari from this Court have an obligation to demonstrate that there are "special and important reasons" for the Court to issue a Writ of Certiorari. 28 U.S.C. Sup. Ct. R. 19(1). Gen-

erally, such review is only afforded in those cases where there is a split among the state supreme courts or federal circuits regarding important federal questions. It is not a remedy for achieving "individual justice in individual cases." Wright, Miller, Cooper and Grossman, *Federal Practice and Procedure,* Jurisdiction §4004.

The Petitioner has failed to demonstrate his case reaches the level of importance normally required by the Court. While he alleges innumerable constitutional deficiencies in the Kansas Supreme Court Rules for Discipline of Attorneys an examination of those allegations reveals their shallow, frivolous, and capricious quality. In addition, the issue he raises has been considered by other courts and universally resolved adversely to Petitioner.

It should be noted that the Kansas Supreme Court Rules relating to discipline of attorneys (Appendix "D" and "E") are substantially the same as those recommended by the American Bar Association. *Standards for Lawyer Discipline and Disability Proceeding,* Joint Committee on Professional Discipline, American Bar Association. Thus, it is apparent that Kansas rules are in keeping with the vast majority of her sister states. They have passed the scrutiny of hundreds of dedicated attorneys who helped draft the model rules. While certainly this is no guarantee of constitutionality, it does demonstrate a uniformity of opinion regarding such rules and does not support an argument for Court review of the rules.

Respondent will not respond to each and every allegation made by the Petitioner since an argument on the merits is inappropriate at this time. However, attached as an appendix is the opinion of Judge Clarence Brimmer in the case of *Phelps v. The Kansas Supreme Court et al.,* supra. Judge Brimmer responded to each of Petitioner's claims in detail. It should be noted that no authority exists

to support the positions taken by Petitioner. Rather, his arguments are entirely novel and without merit. Thus, clearly failing to meet the burden incumbent upon a Petitioner seeking a Writ of Certiorari.

Petitioner relies heavily on the case of *In Re Ruffalo,* 390 U.S. 544 (1967). He argues that the Kansas Supreme Court's actions in *State v. Phelps,* supra, directly contradict this Court's opinion. Petitioner's reliance is misplaced. A careful examination of *In Re Ruffalo,* supra, reveals its inapplicability.

The Respondent in *In Re Ruffalo,* had been disbarred by the Ohio Supreme Court. His original disciplinary hearing had charged him with many counts of impropriety including solicitation by use of an investigator. Ruffalo specialized in representing railroad employees who had been injured on the job. He utilized an investigator, who also worked for a railroad as a yardman. On occasion Ruffalo asked his investigator to handle matters involving the investigator's employer. At the close of Ruffalo's disciplinary hearing the complaint was amended to include a change that Ruffalo violated the Code of Professional Responsibility by having an investigator who was required to work against the interests of his own employer. This last charge was added after Ruffalo and the investigator had already testified. The Ohio Supreme Court found only the one violation of professional ethics and disbarred Ruffalo. It should be noted that Ruffalo sought a Writ of Certiorari, but was denied. *Mahoning County Bar Assn. v. Ruffalo,* 176 Ohio St. 263, 199 N.E. 2d 396, cert. denied, 379 U.S. 931.

The federal courts then began their disciplinary process based on the state court action. The United States District Court found the violation insufficient to justify disbarment and allowed Ruffalo to continue to practice. The Sixth

Circuit Court of Appeals ordered Ruffalo to show cause why his name should not be stricken from the rolls. After a review of the record from the Ohio courts the Sixth Circuit concluded that Ruffalo's name should be stricken. *In Re Ruffalo*, 370 F. 2d 447 (6th Cir. 1967). This Court granted certiorari and reversed the Sixth Circuit. The majority of the Court held that the notice given Ruffalo in the Ohio disciplinary proceeding was inadequate and created a "trap" for Ruffalo. In addition, Ruffalo's improper conduct was insufficient to justify disbarment. The *Ruffalo* opinion had important limitations. The standard created in *Ruffalo* was a standard for federal courts. It was specifically not applied to the state proceeding.

The facts in *In Re Ruffalo,* supra, are not analogous to this case. Petitioner claims that the Kansas Supreme Court added charges after he presented his defense, ã la Ruffalo. A short review of Petitioner's argument will demonstrate the inapplicability of *In Re Ruffalo,* supra.

Petitioner claims that the Kansas Supreme Court made findings and conclusions without notice or opportunity to be heard and second that he made new allegations after he presented his evidence. Specifically, Petitioner is referring to the Kansas Court's findings that Petitioner filed and prosecuted a lawsuit for the purpose of holding the defendant up to unnecessary public ridicule and to harass the defendant. Petitioner argues that the hearing panel had limited the evidence to other issues and he was not allowed to defend himself in regard to these allegations. Petitioner had specifically repudiated the hearing panel's report and requested a hearing on the merits by the Supreme Court. Petitioner had voluntarily introduced the evidence which formed the basis for these conclusions, even though, the state had been overruled in its attempts to present the same evidence.

But importantly, these were not the only allegations or findings which formed the basis for the discipline. The Kansas Supreme Court used this examination of the trial court record and its findings in that regard to enhance the punishment or discipline. Unlike *In Re Ruffalo,* supra, where there was only a single instance of improper conduct, in this instance there are numerous findings of misconduct.

On examination, it is apparent that Fred W. Phelps, Sr., has not met his burden in seeking a Writ of Certiorari. His claim does not involve important federal or state questions of law. There is no disagreement among various courts as to issues involved herein. The Kansas Supreme Court has not contradicted or repudiated any federal law, constitutional provision, or decisions of this Court. Like many a losing party, Fred W. Phelps, Sr., appears before this Court a disgruntled litigant unable to accept the fact that he had his day in court and lost. The Court should not burden itself with matters such as this one. Fred W. Phelps, Sr., was afforded due process throughout his disciplinary procedure. He was allowed to argue his case "on the merits" before the highest court in the jurisdiction. He sought review of the decision in the United States District Court for the District of Kansas and was denied. He now tardily appears before this Court and again seeks review. This Court should deny the Petition for Writ of Certiorari as not being timely filed and as not presenting a substantial federal question.

SCOTT, QUINLAN & HECHT
By PHILIP A. HARLEY
3301 Van Buren
Topeka, Kansas 66611
(913) 267-0040
Attorneys for Respondent

APPENDIX

APPENDIX "A"

IN THE
SUPREME COURT OF THE STATE OF KANSAS
No. 50834

STATE OF KANSAS,
Petitioner,

vs.

FRED W. PHELPS, SR.,
Respondent.

DOCKET SHEET

NOTICE OF APPEAL

Feb. 12, 1979	Complaint
Feb. 12, 1979	Answer
Feb. 12, 1979	Panel Report, Findings, Conclusions and Recommendation
Feb. 12, 1979	Citation (Copy mailed to Respondent certified mail, Receipt No. 761797)
Mar. 2, 1979	Respondents Exceptions 2 tp & proof
Mar. 5, 1979	I, Betty Phelps This date received 6 Volumes of Transcript.
Mar. 23, 1979	Motion by Respondent for extension of time to file brief and Alternative Motion for Full Record
Mar. 23, 1979	Motion by Phelps to Dismiss (9 TP) & Proof
Mar. 23, 1979	Request for Oral Argument (9 TP) & Proof

Mar. 28, 1979	Response to Respondent's Alternative Motion filed 3-23-79. (9 TP) & Proof
Mar. 28, 1979	Reply to Respondent's Motion to Dismiss (9 TP) & Proof
April 2, 1979	Denied.
April 2, 1979	Denied
April 2, 1979	Clerk is directed to furnish Respondent with copies of pages 302-321, inclusive, 344, 396, and 406 of transcript. Copies of any exhibits are to be made available to respondent at his expense and paid for at time. Respondent granted to April 20, 1979 to file brief FINAL EXTENSION Journal Indexed Counsel notified
April 2, 1979	Response to Petitioner's "Reply to Respondent's Motion to Dismiss". (9 TP) & Proof
April 3, 1979	Noted and considered. Moot as motion decided prior to filing of response. Journal Indexed Counsel notified
April 20, 1979	Motion by Respondent to file brief in excess of (50) pages (9tp) 7 Proof
April 20, 1979	Brief of Respondent
April 23, 1979	Granted. Journal Indexed Counsel notified
April 24, 1979	Motion by Disciplinary Counsel to Supplement Record (9 TP) & Proof
April 25, 1979	Cause entered trial Docket Docket indexed Cause assigned for June 5, 1979 Journal indexed Counsel notified by printed docket
April 30, 1979	Response to Motion to Supplement Record (9 TP) & Proof

May 1, 1979	Denied Journal Indexed Counel notified
May 7, 1979	Brief of Appellee
May 16, 1979	Motion for Leave to File Reply Brief in Excess of 15 Pages (8 TP) & Proof
May 17, 1979	Granted. Journal Indexed Counsel notified
May 24, 1979	Reply Brief of Respondent
June 8, 1979	Motion by Appellee for extension of time to file Post-Hearing brief Post Decision Brief in hold file
June 11, 1979	The Court finds the ends of justcie will be best served by granting the motion and The State of Kansas shall have three days to file a reply brief. Journal Indexed Counsel notified
June 12, 1979	Post Hearing Brief of Respondent.
July 20, 1979	Judgment entered Order of Disbarment Per Curiam Journal indexed—Counsel notified Syllabus & Opinion filed Syllabus & Opinion copied Judgment docketed Mandate issued Satisfying Judgment—Taxing costs Balance deposit returned to Entries
Aug. 9, 1979	Motion for Stay of Order of Disbarment (9 TP) & Proof
Aug. 13, 1979	Amended Motion for Stay (10 TP) & Proof
Aug. 30, 1979	The motion to stay the order of disbarment, entered July 20, 1979, is Denied. Journal Indexed Counsel notified

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
NO. 79-1381

FRED W. PHELPS, SR.,
Plaintiff,

vs.

THE KANSAS SUPREME COURT, THE HONORABLE ALFRED G. SCHROEDER, THE HONORABLE ALEX M. FROMME, THE HONORABLE DAVID PRAGER, THE HONORABLE ROBERT H. MILLER, THE HONORABLE RICHARD M. HOLMES, THE HONORABLE KAY McFARLAND, and THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFEL, in His Capacity as Disciplinary Administrator of The Kansas Supreme Court, and THE STATE OF KANSAS,
Defendants.

JUDGMENT DISMISSING ACTION

(Filed October 31, 1979)

The above-entitled matter having come on regularly for hearing before the Court, both parties appearing by and through their respective attorneys, and the Court having heard argument of counsel in support of and in opposition to the Defendants' Motion to Dismiss and the Plaintiff's Motion for a Preliminary Injunction and for Certification of Class, took the matter under advisement, and having reviewed all material on file herein and having prepared its Order finding in favor of the Defendants' Motion to Dismiss and against the Plaintiff's motions; it is hereby

ORDERED that the Complaint filed herein, together with the cause be, and the same is hereby dismissed with prejudice, the parties to bear their own costs of action expended herein.

Dated this 29th day of October, 1979.

/s/ Clarence A. Brimmer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
NO. 79-1381

FRED W. PHELPS, SR.,
Plaintiff,

vs.

THE KANSAS SUPREME COURT, THE HONORABLE ALFRED G. SCHROEDER, THE HONORABLE ALEX M. FROMME, THE HONORABLE DAVID PRAGER, THE HONORABLE ROBERT H. MILLER, THE HONORABLE RICHARD M. HOLMES, THE HONORABLE KAY McFARLAND, and THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court, and THE STATE OF KANSAS,
Defendants.

ORDER

(Filed October 31, 1979)

The above-entitled action having come before this Court upon the Plaintiff's motion for a preliminary injunction and the Defendants' motion to dismiss, the Court having advanced and consolidated the trial of this action on the merits with the hearing of the application of the Plaintiff for a preliminary injunction under Rule 65(a)(2), F.R.C.P., and the parties having stipulated to the admission in evidence of extensive and voluminous exhibits consisting in part of the entire record before the Kansas Supreme Court in the case of *State v. Phelps*, No. 50834, the record on appeal in two cases entitled *Robinson v. Brady*, the rules of the Kansas Supreme Court relating to discipline

and disbarment of attorneys, and the Order of Disbarment of the Plaintiff; and the Court having heard and considered the arguments in support of and in opposition to said motions, and having read the briefs and other documents filed in the case, and being otherwise fully advised in the premises, does find as follows:

The above-entitled case arises out of disciplinary proceedings had before the Supreme Court of the State of Kansas and its order on July 20, 1979 disbarring the Plaintiff from the practice of law before the courts of the State of Kansas. The Plaintiff seeks to enjoin enforcement of the Order of Disbarment and the rules of the Kansas Supreme Court for discipline and disbarment of attorneys because of his claims of the unconstitutionality thereof.

The disciplinary proceedings before the Supreme Court of Kansas resulted from the actions of Phelps in trying the case of *Robinson v. Brady*, No. 125, 742 (1977). That action was brought by Sherman Robinson against Carolene Brady, a court reporter, of the State of Kansas. Robinson had been a defendant in a criminal action in which certain proceedings had been taken with Carolene Brady acting as the court reporter in her official capacity. Robinson alleged that Brady promised him a transcript of certain of those proceedings by a specific date and that she failed to provide Robinson with the transcript as promised. Robinson alleged in the suit that Brady had violated her official responsibilities and had breached an express contract to provide the transcript. Damages were sought from Brady as a result of her alleged actions and Phelps appeared as Robinson's attorney in the case.

During the trial of *Robinson v. Brady*, the court refused to hear testimony from a number of witnesses listed by Phelps. Phelps made a proffer at trial that he believed that if the witnesses were permitted to testify they would

testify, among other things, that they knew Brady, knew her reputation for truth and veracity, knew said reputation to be bad, and knew of instances where Brady had violated her sworn oath of office by leaking confidential information that she had access to through her position as a court reporter.

The case ended in a verdict for the Defendant, Carolene Brady, and at the close of trial Phelps moved for a new trial. In his motion for a new trial Phelps offered as error on the part of the trial court the refusal to hear evidence from the witnesses referred to above. He again stated in his motion for a new trial what he expected the witnesses to testify to if they were allowed to testify. The motion was denied and the case was eventually affirmed on appeal.

It was brought to the attention of the disciplinary administrator for the State of Kansas that the witnesses referred to would not have testified as Phelps had stated they would, and that Phelps had no reasonable basis upon which to assume that some or all of them would have in fact so testified. The disciplinary administrator filed proceedings against Phelps, alleging that Phelps violated the attorneys' Code of Ethics, his oath of office, and Kansas statutory law by his actions in the above case. A hearing was held before a disciplinary panel of the State of Kansas on the allegations. At that hearing it was stated that the sole issue involved was whether Phelps had a reasonable basis from which to assume that the witnesses would have testified in the manner in which he stated that he thought they would. The issue of the truth of the allegations that Phelps was attempting to prove by the testimony was specifically excluded as an issue before the hearing panel.

The hearing panel found, as a result of the proceedings held before it, that Fred Phelps had no reasonable basis from which to have believed that witnesses would have testified as he said they would in his proffer at trial and in the motion for a new trial. The findings of the hearing panel, along with a recommendation of public censure, were sent to the Supreme Court of Kansas.

Disciplinary proceedings on the matter were had before the Kansas Supreme Court. They found that Phelps had violated his oath as an attorney, that he had violated the disciplinary rules of the State of Kansas, that he had violated Kansas statutory law by his actions. The Supreme Court did not follow the recommendations of the hearing panel in regard to the punishment to give Phelps. Instead Phelps was disbarred from practice before the courts of Kansas on July 20, 1979.

Following his disbarment in that action, Phelps filed suit in this Court alleging constitutional violations in the adoption, administration, and application of the Kansas disciplinary rules pertaining to attorneys, and seeking injunctive and declaratory relief from this Court declaring said rules to be unconstitutional on their face and as applied to the Plaintiff in the disciplinary proceedings before the Kansas Supreme Court. Plaintiff prays that Defendants be enjoined and restrained from enforcing the same generally. The Defendants have moved to dismiss the complaint on the grounds that it fails to state a cause of action for which relief can be granted, and for lack of subject matter jurisdiction. The matter is before the Court now on the merits of the action as well.

The Defendants in this action are the individual judges of the Kansas Supreme Court, the disciplinary administrator of the Kansas Supreme Court, and the State of Kansas itself. Plaintiff has styled his complaint as a civil

rights complaint under 42 U.S.C. §§ 1981, 1983, 1986, and 1988, and 28 U.S.C. §§ 1331, 1343, and 2201. He also alleges many violations of the United States Constitution. Plaintiff desires the complaint to be heard as a class action suit including all of the attorneys of the State of Kansas and all of the applicants to the bar in Kansas. Plaintiff has formulated his suit to appear to be an action to protect the rights of all attorneys of the State of Kansas, and to determine the constitutionality of the rules of the Kansas Supreme Court on their face as well as applied in his disciplinary proceedings. A close reading of the complaint indicates that the true purpose of the Plaintiff in filing this suit is to have this Court review the proceedings of the Kansas Supreme Court in its action against the Plaintiff. Plaintiff alleges that the disciplinary rules of the Kansas Supreme Court are unconstitutional on their face, but informs the Court that it is necessary to go into his particular case to show why the rules are unconstitutional as written. He asserts in the complaint that, "the entire course of conduct of Defendants as complained of herein with respect to their treatment of this Plaintiff, illustrates and demonstrates that Defendants have adopted and are administering said Rules in violation of the Federal Constitution." Plaintiff desires a review of the proceedings had in his individual case, claiming in part that it is necessary to review those proceedings to understand the underlying unconstitutionality of the rules.

The necessity for this type of attack is evident. The United States Supreme Court and the lower federal courts have held numerous times that the lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts. *Selling v. Radford,* 243 U.S. 46 (1917), *Theard v. U.S.,* 354 U.S. 278 (1958), *Gately v. Sutton,* 310 F.2d 107 (10 Cir., 1962), and *Doe v. Pringle,* 550 F.2d 596 (10th Cir., 1976). This

is true even though the state court proceedings are alleged to have been constitutionally deficient. The Tenth Circuit in *Doe v. Pringle,* supra, at 599, held that, "We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a particular application for admission to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights. . . . Doe cannot invoke the provisions of § 1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review in the United States Supreme Court." The civil rights statutes may not be read as asserting a new form of federal review between the appellate courts of the states and the United States Supreme Court. *Mildner v. Gulotta,* 405 F.Supp. 182 (D.C.N.Y., 1975).

As indicated by the court in *Doe v. Pringle,* supra, the only federal court that may review the proceedings of the Kansas Supreme Court is the United States Supreme Court. We do not have the authority to review the proceedings of the Kansas Supreme Court in the matter of the disbarment of Fred Phelps. *Mayes v. Honn,* 542 F.2d 822, 823 (10th Cir., 1977). That the United States Supreme Court will and does review disciplinary proceedings of state supreme courts is shown by the number of such cases recently before the Supreme Court. *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), *In Re Primus,* 436 U.S. 411 (1978). All of those proceedings, reached the United States Supreme Court on writ of certiorari from the state courts.

However, the court in *Doe v. Pringle,* supra, acknowledged that the situation is different when the complainant asserts due process or equal protection deprivations in

the adoption and/or administration of general rules and regulations governing admission and discipline. This Court does have the ability to determine the Plaintiff's allegations that the rules of the Kansas Supreme Court are unconstitutional as generally written and administered.

Disbarment, while designed for the protection of the public, is in effect a taking of the right to practice law as punishment to the attorney. An attorney is entitled to procedural due process during disbarment proceedings. *In Re Ruffalo,* 390 U.S. 544 (1968). Procedural due process generally means that a party is entitled to notice of the charges against him, *In Re Ruffalo,* supra, *In Re Oliver,* 333 U.S. 257 (1948), and *Memphis Light, Gas and Water Division v. Craft,* 436 U.S. 1 (1978), and a hearing on those charges. *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Boddie v. Connecticut,* 401 U.S. 371 (1971), and *Wolff v. McDonnell,* 418 U.S. 539 (1974).

There are no set rules as to what type of hearing and notice procedural due process demands. Procedural due process calls for such protection as the situation demands. *Memphis Light, Gas and Water Division v. Craft,* supra. The Supreme Court in *Mathews v. Eldridge,* supra, set out a balancing test to be used as a guideline to the type of protection that an individual is to be afforded in varying situations. "Our decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement will entail."

A review of the Kansas disciplinary rules and the way in which they are applied shows that they provide more than adequate due process and equal protection. All complaints against an attorney must go through the disciplinary administrator and a Review Committee consisting of three members of the State Board of Bar Examiners before formal charges may be filed against an attorney. Once charges are filed, the formal hearing may be preceded by a prehearing to clarify and limit the issues. The formal hearing itself is conducted much like a trial in that the statutory rules of evidence apply, the respondent may cross-examine the witnesses and present evidence, and the proceedings are recorded by a certified court reporter. The state has the burden of proving its case by clear and convincing evidence.

If the respondent takes exception to the findings of the panel hearing, the case may be argued before the Supreme Court of Kansas. The parties are allowed to file briefs and the hearing is open to the public. The Supreme Court hearing is on the merits of the case as supported by the hearing panel record.

Plaintiff alleges that certain of the specific rules mentioned above are unconstitutional. These rules include the denial of extensive discovery, the failure of the hearing panel proceedings to be open to the public, the use of a burden of proof standard less than the criminal standard of beyond a reasonable doubt, the denial of a hearing on the merits, the consideration of Phelps' past discipline by the Supreme Court of Kansas in justifying the severity of the punishment and the expansion of issues by the Supreme Court to include issues that had not been considered by the hearing panel.

These rules complained of by the Plaintiff do not amount to a denial of due process or equal protection to an

attorney in the disbarment process. Plaintiff has not cited a single case that supports his proposition that the denial of extensive discovery is a denial of due process. One court recently considering that issue specifically found that it was not a denial of due process. *Matter of Murray,* 362 NE2d 128 (Ind. 1977). It should be noted that even criminal defendants are afforded only the minimum of discovery and that has never been held to be a denial of due process. *Palermo v. United States,* 360 U.S. 343 (1959), *Campbell v. United States,* 365 U.S. 85 (1961).

Plaintiff's claim that the procedures of Kansas Supreme Court are secret inquisitorial hearings is mere rhetoric without merit. The panel hearings are now by law open to the public, but were not so at the time of the Phelps hearing. However, the closed nature of the panel hearings as they existed at that time did not deny attorneys due process or equal protection of the law.

In *Getty v. Reed,* 547 F. 2d 971 (6th Cir., 1977) aplant alleged the unconstitutionality of the attorney disciplinary proceedings of the State of Kentucky. The Kentucky proceedings involved in that case provided attorneys with fewer rights than those provided by the Kansas Supreme Court rules. The Kentucky State Bar examiners, pursuant to the rules in effect at that time, reviewed the evidence against the attorney *in camera* without the attorney having the right to be present. They then made recommendations to the Kentucky Supreme Court as to the disciplinary action to be taken. The Supreme Court of Kentucky held an open hearing with the attorney present based on the record of the *in camera* hearing. The *Getty* court found no significant violation of due process in the rules of the Kentucky Supreme Court.

Although rudimentary requirements of due process must be observed in disciplinary proceedings, there is no

requirement for a public hearing. *State v. Turner,* 538 P. 2d 966 (Kan. 1975). Despite this, the plaintiff's final disciplinary proceeding before the Kansas Supreme Court was open to the public, and plaintiff was afforded a public hearing.

Plaintiff alleges constitutional deficiency in the standard of proof required in the Kansas proceedings. Plaintiff asserts that disciplinary proceedings should be subject to the criminal standard of proof beyond a reasonable doubt. No authority is given for this proposition. Disciplinary proceedings are unique proceedings. *Niles v. Lowe,* 407 F. Supp. 132 (D.C. Hawaii, 1976), *Polk v. State Bar of Texas,* 480 F. 2d 998 (5th Cir., 1973). They are not criminal proceedings. *In Re Echeles,* 430 F. 2d 347 (7th Cir., 1970), *Yokozeki v. State Bar,* 521 P. 2d 858 (Cal., 1974), *Office of Disciplinary Counsel v. Campbell,* 342 A. 2d 616 (Penn. 1976), *cert. denied,* 424 U.S. 926 (1976). We have found no authority for the proposition that the standard of proof in disciplinary proceedings should be beyond a reasonable doubt. Authority does exist for the proposition that proof by clear and convincing evidence is a proper standard. *In Re Fischer,* 179 F. 2d 361 (7th Cir., 1950), *cert. denied,* 340 U.S. 825 (1950). *In Re Ryder,* 263 F. Supp. 360 (E.D. Va. 1967), affirmed 381 F. 2d 713 (4th Cir., 1967).

Plaintiff's other contentions that the Kansas Supreme Court Rules are constitutionally deficient are similarly without merit. This Court cannot agree that the Kansas Supreme Court based its disciplinary action on charges that Plaintiff did not have notice of or opportunity to rebut. Plaintiff was given notice of the charges against him and he extensively answered, briefed, and argued each point of contention. Neither can the Court agree that the consideration of Phelps' past disciplinary conduct consti-

tuted a denial of due process, equal protection, or any other constitutional right. *In Re Echeles,* supra, *State v. Hoover,* 574 P. 2d 1377 (Kans. 1978), *Silver v. State Bar,* 528 P. 2d 1157 (Cal. 1974).

As stated above, the essential requirements of any disbarment proceedings are notice and opportunity to be heard. *In Re Echeles,* supra. The minimum standards which must be observed in proceedings to revoke or suspend a license to practice law are not identical to nor necessarily as strict as criminal proceedings. *In Re Echeles,* supra, at page 352. Similarly a disciplinary proceeding is not a full-blown trial and the attorney need not be provided with all of the protections of a trial. *Mildner v. Gulotta,* supra, *Javits v. Stevens,* 382 F. Supp. 131, (D.C. N.Y. 1974), *State v. Turner,* 217 Kan. 575 (1975).

Weighing the three interests to be balanced under a *Mathews v. Eldridge,* supra, test, the Court finds that the Kansas Supreme Court disciplinary rules meet constitutionally required standards. They sufficiently protect the attorney's interest in practicing law through hearings that minimize the risk of an erroneous deprivation of such interest, while recognizing the public interest in the regulation of the legal profession. *Theard v. U.S.,* supra.

There are other reasons that the relief requested by the Plaintiff cannot be granted. Injunctive relief is an extraordinary remedy and should be granted only under special circumstances. *Checker Motors Corp. v. Chrysler Corp.,* 405 F. 2d 319 (2d Cir. 1969), *cert. denied,* 394 U.S. 999 (1970), *Goldammer v. Fay,* 326 F. 2d 268 (10th Cir. 1964), *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.,* 363 U.S. 528 (1960). The granting of injunctive relief is within the sound discretion of the trial judge. *Hecht v. Bowles,* 321 U.S. 321 (1944), *Lemon v. Kurtzman,* 411 U.S. 192 (1973).

Federal courts do have the ability to enjoin state court mandates under 42 U.S.C. § 1983 as an exception to the general prohibition to federal courts enjoining state courts under 28 U.S.C. § 2283, *Mitchum v. Foster,* 407 U.S. 225 (1972), *Henry v. First National Bank of Clarksdale,* 595 F. 2d 291 (1979), but this is not a situation where it would be proper for this Court to grant such relief. Federal courts should not enjoin the actions of the state courts unless it is absolutely necessary that they do so. *Stefanelli v. Minard,* 342 U.S. 117 (1951, *Rizzo v. Goode,* 423 U.S. 362 (1976).

We recognize that the punishment of absolute disbarment is extremely severe, but the Supreme Court of Kansas justified its severity by noting that Plaintiff had previously been suspended. The evidence establishes that past misconduct, which the Kansas Supreme Court had a right to consider as one of many factors before imposing discipline. *Resner v. State Bar of California,* 349 P. 2d 67 (1960). Discipline of lawyers is a matter clearly within the province of the state courts before which the attorneys are licensed to practice. As such the federal courts must exercise restraint in enjoining the disciplinary rules of the state courts. *Younger v. Harris,* 401 US 37 (1971), *Huffman v. Pursue Ltd.,* 420 US 592 (1975), *Rizzo v. Goode,* supra, 423 US 362 (1976). To do otherwise would deny the states the integrity, effectiveness, and traditional autonomy of the sovereign court systems. *Erdmann v. Stevens,* 458 F. 2d 1205 (2nd Cir., 1972), *cert. denied,* 409 US 889 (1972), *Theard v. U.S.,* supra, and *Cohen v. Hurley,* 366 US 117 (1961).

Equitable relief should also be denied if the complainant has failed to exhaust his legal remedies. *Beacon Theatre Inc. v. Westover,* 359 US 500 (1959). Plaintiff had an adequate remedy at law at the time this case was filed.

Kansas disciplinary procedures are original actions in the Kansas Supreme Court. Rule 212 Discipline of Attorneys, 224 Kan. lxxxvi, Rule 9.01 Appellate Practice, 224 Kan. xlix. As such, Plaintiff could have filed a motion for a rehearing or modification of the Order of Disbarment within 20 days. Rule 7.06 Appellate Practice, 224 Kan. xlvii. This would have stayed the order pending the outcome of the issues on review.

In addition, Plaintiff had the right under 28 U.S.C. §1257(2) or 28 U.S.C. §1258(3) to petition the Supreme Court of the United States to take the case on appeal or upon writ of certiorari. Plaintiff has failed to exhaust his legal remedies. For the above reasons, the relief requested by the Plaintiff is inappropriate.

The parties having submitted the case to the Court on the merits based on the documents heretofore filed in the action; it is hereby

ORDERED that for the reasons stated above, the Defendants' motion to dismiss is hereby granted; it is further

ORDERED that Plaintiff's Renewed Motion for Stay, Motion for Preliminary Injunction, and Motion for Certification of Class be, and the same hereby is, denied.

Dated this 29th day of October, 1979.

/s/ (Illegible)
United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
No. 79-1381

FRED W. PHELPS, SR.,
Plaintiff,

vs.

THE KANSAS SUPREME COURT, et al.,
Defendants.

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

(Filed December 10, 1979)

Upon reading and considering the Plaintiff's Motion to Alter or Amend Judgment, and for Clarification, and the Defendants' Reply to Plaintiff's Motion to Alter or Amend Judgment, the Court finds that oral argument of said motion is not required, and further finds:

(1) The Court was well aware of this being a civil rights action. It nonetheless is still of the opinion that Plaintiff's real and underlying purpose was to overturn the proceedings of the Kansas Supreme Court. The sentence referred to by counsel on Page 3 of the motion is taken out of context and needs no further clarification.

(2) The Court is of the view that the sentence in its Order of October 31, 1979, quoted on Page 5 of the Plaintiff's motion is correct and that Plaintiff's other contentions are in fact devoid of any merit.

(3) There is no reason to reconsider the Court's decision of October 31, 1979. The matters referred to in Plaintiff's motion were considered by this Court and deemed

to be without merit. Despite Plaintiff's complaints, we believe that the Plaintiff received a fair hearing before the hearing panel and the Supreme Court of Kansas. Even in a criminal proceeding a defendant is not entitled to a perfect hearing, but only one that observes the fundamental fairness essential to the concept of justice. *Lisbenda v. California,* 314 U.S. 219 (1941). The Plaintiff's hearing before the Supreme Court of Kansas met that standard of fundamental fairness.

(4) The Order granting Motion for Preliminary Injunction in Part and Denying the Balance Thereof, dated August 17, 1979, expired with the entry of the Order of October 31, 1979. It should be formally terminated. Therefore, it is

ORDERED that Plaintiff's Motion to Alter or Amend Judgment and for Clarification be denied, and that the Order Granting Motion for Preliminary Injunction in Part and Denying the Balance Thereof be terminated and revoked.

Dated this 7th day of December, 1979.

/s/ (Illegible)
United States District Court

APPENDIX "D"

Rules Relating to the Admission, Discipline and Disbarment of Attorneys, Kansas Supreme Court Rules 201-231, (adopted July 9, 1976, repealed January 8, 1979)

PREFATORY RULE

(*a*) Repeal of Former Rules. Rules 201 through 215 inclusive, are hereby repealed.

(*b*) The following Rules, 201 through 230 inclusive, shall be effective October 1, 1976. The Code of Professional Responsibility, previously Rule 501, as amended, remains in effect and is renumbered as Rule 231.

(*c*) Any disciplinary investigation pending on the effective date of these Rules shall be transferred to the Disciplinary Administrator for further action in accordance with Rules relating thereto.

(*d*) Any proceeding in which a formal hearing has been commenced shall be concluded under the procedure existing prior to the effective date of these Rules.

Rule 201
JURISDICTION

(*a*) Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the disciplinary jurisdiction of the Supreme Court and the authority hereinafter established.

(*b*) Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, or to prohibit any bar association from censuring, suspending or expelling its members from membership.

Rule 202
GROUNDS FOR DISCIPLINE

The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege of practicing law. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Code of Professional Responsibility now set forth in Rule 231 hereof, or as hereinafter amended, shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.

A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against said attorney based upon the conviction.

Rule 203
TYPES OF DISCIPLINE

(*a*) Misconduct shall be ground for:

(1) Disbarment by the Supreme Court; or

(2) Suspension by the Supreme Court; or

(3) Public censure by the Supreme Court; or

(4) Private informal admonition by the Disciplinary Administrator; or

(5) Any other form of discipline the Supreme Court deems appropriate.

(*b*) Temporary Suspension by the Supreme Court. The Supreme Court may, on its own motion or on motion of the Board of Law Examiners, issue a citation directing an attorney against whom disciplinary proceedings are pending to appear before the Court and show cause why his license to practice law should not be suspended during the pendency of such proceedings and, after hearing, the Court may enter an order suspending his license for a definite or indefinite period or may discharge the order to chow cause.

Rule 204
STATE BOARD OF LAW EXAMINERS

(*a*) The Supreme Court shall appoint a nine-member board to be known as the State Board of Law Examiners (hereinafter referred to as the Board), which shall consist of:

(1) Three members of the bar of this state appointed for an initial term of three years;

(2) Three members of the bar of this state appointed for an initial term of two years; and

(3) Three members of the bar of this state appointed for an initial term of one year.

Subsequent terms of all members shall be for three years. No member shall serve for more than two consecutive three-year terms. Vacancies shall be filled by the Supreme Court.

(*b*) The Supreme Court shall designate one member as chairman and another as vice-chairman. The chairman shall appoint a secretary.

(*c*) The Board shall act only with the concurrence of a majority of those present and eligible to vote.

(*d*) Members of the Board shall be paid such sum as the Supreme Court may from time to time fix and they shall be reimbursed for their travel and other expenses incidental to the performance of their duties.

(*e*) Board members shall refrain from taking part in any proceeding in which a judge similarly situated would be required to abstain.

(*f*) The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Rules, including the power and duty to assign periodically three of its members as a review committee to review and approve or modify recommendations by the Disciplinary Administrator for dismissals, informal admonitions and institution of formal charges. The members of the review committee shall not participate in any final hearing by the Board, or by a hearing panel appointed by it, on any complaint they have reviewed.

(*g*) The Board shall exercise the powers and perform the duties relative to admission to the bar as hereinafter stated.

(*h*) The Board may adopt rules for its procedure not inconsistent with Rules set forth herein.

Rule 205
DISCIPLINARY ADMINISTRATOR

(*a*) A Disciplinary Administrator shall be appointed by the Supreme Court and serve at the pleasure of the Court. The Disciplinary Administrator shall receive such salary as may be determined by the Court and be reimbursed for travel and other expenses incidental to his duties.

(*b*) The Disciplinary Administrator shall not be permitted to engage in private practice except that the Supreme Court may fix a reasonable period of transition after appointment.

(*c*) The Disciplinary Administrator shall have the power and duty:

(1) With the approval of the Supreme Court to employ and supervise staff needed for the performance of his duties.

(2) To investigate or cause to be investigated all matters involving possible misconduct called to his attention whether by complaint or otherwise.

(3) To present all matters involving alleged misconduct to the review committee.

(4) To file with the Supreme Court certificates of conviction of attorneys for crimes.

(5) To maintain permanent records of all matters processed and the disposition thereof.

(6) To perform such other duties as may be conferred and imposed upon him by these Rules.

Rule 206
PROSECUTING ATTORNEY

(*a*) The Attorney General of the State of Kansas shall be the chief prosecuting officer for the enforcement of these Rules. It shall be his duty:

(1) To prepare for and prosecute all disciplinary proceedings and proceedings to determine incompetency of attorneys before hearing panels, the Board, and the Supreme Court.

(2) To appear at hearings conducted with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to in-

active status because of disability, to cross-examine witnesses testifying in support of such petitions, and to marshal and present available evidence, if any, in opposition thereto.

(*b*) The Supreme Court may, in its discretion, appoint a special prosecutor in lieu of the Attorney General to prosecute any disciplinary matter.

Rule 207
GRIEVANCE COMMITTEES

(*a*) The Disciplinary Administrator may call upon any local or state bar association grievance committee to investigate or assist in the investigation of any complaint upon such terms and conditions as the Disciplinary Administrator shall direct.

(*b*) Such grievance committee shall assist the Disciplinary Administrator in investigations and such other matters as may be requested by him.

Rule 208
DUTIES OF THE BAR AND JUDICIARY

(*a*) It shall be the duty of each member of the bar of this state to aid the Supreme Court, the Board, and the Disciplinary Administrator in investigations concerning complaints of unethical practice of law, and to communicate to the Disciplinary Administrator any information he may have affecting such matters.

(*b*) It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct, which in his opinion constitutes probable cause for discipline of an attorney or other proceeding under these Rules.

(c) It shall be the duty of each judge of this state to report to the Disciplinary Administrator any action or inaction on the part of an attorney appearing before him, which in the opinion of the judge may constitute cause for discipline or other proceeding under these Rules. Upon receipt of such report, it shall be processed as hereinafter provided for complaints. Nothing herein shall be construed in any manner as limiting the powers of such judge in contempt proceedings.

Rule 209
REGISTRATION OF ATTORNEYS

(*a*) All attorneys, including justices and judges, admitted to the practice of law before the Supreme Court of the State of Kansas, shall annually, on or before the first day of July each year, register with the Clerk of the Supreme Court upon such form as the Clerk shall prescribe; provided that in the year of an attorney's admission to the bar, the attorney shall register within thirty days of the date of admission. At the time of each registration, each registrant shall pay an annual fee in such amount as the Supreme Court shall order.

(*b*) No registration fee shall be charged to any attorney newly admitted to the practice of law in Kansas until the first regular registration date following admission.

(*c*) Annually on or before June 1 of each year the Clerk of the Supreme Court shall mail to each individual attorney then authorized to practice law in this state, at his last known office address, a statement of the amount of the registration fee to be paid for the next year. Failure of any attorney to receive a statement from the Clerk shall not excuse the attorney from paying the required fee. Every registrant shall within thirty days of any change of his office address notify the Clerk of such change.

(*d*) Any attorney who fails to pay the registration fee by August 1 of each year may be suspended from the practice of law in this state as prescribed in subsection (*e*). It shall be the duty of each member of the judiciary of this state to prohibit any attorney who has been suspended from the practice of law from appearing or practicing in court, and it shall be the duty of each member of the bar and judiciary to report to the Disciplinary Administrator any attempt by any attorney to practice law after suspension.

(*e*) The Clerk of the Supreme Court shall mail a notice to any attorney who has failed to comply with Rule 209 (*a*) that his right to practice law will be summarily suspended thirty days following the mailing of notice if such registration fee is not paid within that time. The notice shall be forwarded to his last known address by certified mail, return receipt requested. The Clerk shall certify to the Court names of Attorneys who fail to register and pay said fee within said period of time and thereupon the Court shall issue an order suspending said attorneys from the practice of law in this state. No notice shall be mailed and no order of suspension issued to any attorney who has complied with subsection (*j*) hereof.

(*f*) An attorney whose authority to practice law in this state has ceased solely because of his failure to register and pay the annual registration fee may be reinstated by the Court upon application by such attorney and the payment by such attorney of all delinquent registration fees (except back fees may be waived for good cause shown), and payment of such additional amount as the Court may require.

(*g*) The Clerk of the Supreme Court shall issue to each attorney duly registered hereunder a registration card

in a form approved by the Court, evidencing such annual registration.

(*h*) All moneys collected as registration fees hereunder shall be deposited by the Clerk of the Supreme Court in a bar disciplinary fee fund. Disbursements from such fund shall be made only upon voucher signed by a member of the Court or by some person or persons duly authorized by the Court, and such disbursements shall be made only to defray the cost and expense of administering the registration procedure established hereunder and the disciplinary procedures carried on pursuant to the Rules of the Court.

(*i*) An attorney appearing in any action or proceeding in this state solely in accordance with the provisions of Rule 116 of the Supreme Court shall not be subject to registration hereunder.

(*j*) An attorney who has retired or is not engaged in practice in this state may so notify the Clerk of the Supreme Court in writing. Upon the filing of such notice, the attorney shall not be eligible to practice law in this state until such time as he shall make application and be reinstated by the Court as provided in Rule 209 (*f*). Any such attorney shall be relieved from the payment of the annual registration fee during the period of retirement or inactive status; provided, any attorney whose retirement or inactive status has extended over a period of five years shall not be reinstated until such time as he complies with any conditions imposed by the Court for reinstatement.

Rule 210
COMPLAINTS

All complaints or reports relating to misconduct of any attorney or to the unethical practice of law shall

be filed with the Disciplinary Administrator. Any complaints or reports filed with the Board or any member thereof, the Clerk of the Supreme Court, any state or local bar grievance committee, or any other body shall be immediately delivered to the Disciplinary Administrator. The Disciplinary Administrator shall promptly docket all complaints or reports received.

Rule 211
INVESTIGATIONS

(*a*) All investigations, whether upon complaint or otherwise, shall be initiated and conducted by the Disciplinary Administrator or under his supervision.

(*b*) The Disciplinary Administrator may refer a complaint or report to the State Bar Association Grievance Committee, a local bar association grievance committee or any member thereof for investigation and report. The Disciplinary Administrator may at any time withdraw such referral and have the complaint or report otherwise investigated.

(*c*) Upon the conclusion of an investigation, the Disciplinary Administrator shall recommend to the review committee dismissal of the complaint, informal admonition of the attorney concerned, or the prosecution of formal charges before a hearing panel. Disposition shall thereupon be made by a majority vote of the review committee, unless it directs further investigation.

Rule 212
FORMAL HEARINGS

(*a*) Hearings shall be conducted by a panel of three attorneys, at least two of whom shall be members of the Board. Hearings may be held at any place in the state. The chairman of the Board shall designate the members

of the panel, the presiding officer thereof, and the matters to be heard by the panel. The presiding officer shall be a member of the Board.

(*b*) Formal disciplinary proceedings shall be instituted by the Disciplinary Administrator by filing a complaint with the secretary of the Board. The complaint shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the complaint shall be served upon the respondent. The respondent shall serve an answer upon the Disciplinary Administrator within twenty days after the service of the complaint unless such time is extended by the Disciplinary Administrator or the hearing panel.

(*c*) Following the service of the answer, or upon respondent's failure to answer, the matter shall be set for hearing by the presiding officer of the panel.

(*d*) The Disciplinary Administrator shall serve a notice of hearing upon the respondent, counsel, and the complaining parties, stating the date and place of the hearing at least fifteen days in advance thereof. The notice of hearing shall state that the respondent is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence.

(*e*) At all hearings witnesses shall be sworn and a complete record made of all proceedings had and testimony taken, either by stenographic means or by electronic recording.

(*f*) If the hearing panel's report does not recommend discipline, the report shall be filed with the secretary of the Board and the Disciplinary Administrator. The Disciplinary Administrator shall notify the respondent and the complainant of the action taken. If the panel by unanimous vote recommends discipline, the complaint and

the report shall be forthwtih filed with the Clerk of the Supreme Court. If not unanimous, the record of the hearing and the report shall be reviewed by the Board. If the Board recommends discipline, its recommendation, together with the complaint and panel report, shall be filed with the Clerk of the Court. If the Board does not recommend discipline the report of the Board shall be filed with the Disciplinary Administrator, who shall notify the respondent and complainant of the action taken.

Rule 213
PROCEEDINGS BEFORE THE SUPREME COURT

(*a*) All disciplinary proceedings filed in the Supreme Court shall be conducted in the name of the State of Kansas by the Attorney General of the State of Kansas, or by a special prosecutor appointed by the Court.

(*b*) Cases for hearing before the Supreme Court shall be filed with the Clerk of the Supreme Court and shall contain a copy of the complaint and respondent's answer, together with fifteen copies of the panel's report and fifteen copies of the Board's recommendation, if any; thereupon, the matter shall be docketed by the Clerk as:

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas,	)	No. .....
v.	)	Original Proceedings
Attorney, *Respondent*.	)	in Discipline

The complaint, answer, report, findings and recommendation of the hearing panel, recommendation of the Board, if any, and transcript, if any, shall constitute the record in the case.

(*c*) Upon docketing of said case the Clerk of the Supreme Court shall mail a copy of the report to the respon-

dent, and shall issue a citation directing the respondent to file with the Clerk either (1) a statement that respondent does not wish to file exceptions to the report, findings, and recommendation, or (2) respondent's exceptions to the report. If respondent's address is unknown and a copy of said report and citation cannot be served upon said respondent, the matter shall stand submitted on the merits upon the filing of a certificate by the Clerk disclosing such facts.

(*d*) If the respondent fails to file exceptions to the report within twenty days after receipt thereof the Supreme Court shall fix a time and place for the imposition of discipline and the Clerk shall notify the respondent by registered or certified mail of such time and place. The respondent shall appear in person and may be accompanied by counsel and may make a statement with respect to the discipline to be imposed. Thereafter, the Court shall impose such discipline as may be deemed proper and just.

(*e*) If the respondent files exceptions the following steps shall be taken:

(1) The Clerk of the Supreme Court shall immediately cause a transcript of the record of the proceedings before the panel to be prepared and filed and a copy to be served upon respondent. Such transcript shall be part of the record and both the state and respondent may refer thereto in their respective briefs, setting forth with particularity the pages of transcript where the material referred to may be found.

(2) The respondent shall have thirty days from service of the transcript to file a brief.

(3) Upon the filing of respondent's brief, the Attorney General or special prosecutor shall have thirty days in which to file his brief, and respondent shall have ten days after filing of the brief of the Attorney General or the special prosecutor to file a reply brief. The briefs shall be of such number and form and be served in such manner as is provided by the Rules relating to appeals in civil actions.

(4) If after thirty days from the service of the transcript upon respondent, he fails to file a brief, he will be deemed to have conceded that the findings of fact made by the hearing panel are supported by the evidence.

(5) The matter shall be set for hearing and heard on the merits.

Rule 214
REFUSAL OF COMPLAINANT TO PROCEED

Neither unwillingness or neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement or compromise between the complainant and the attorney, nor restitution by the attorney shall justify abatement of any complaint.

Rule 215
MATTERS INVOLVING RELATED PENDING CIVIL OR CRIMINAL LITIGATION

Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending civil or criminal litigation, unless authorized by a review committee or hearing panel.

Rule 216
SERVICE

(*a*) Service upon the respondent of the complaint in any disciplinary proceeding shall be made by the Disciplinary Administrator either by personal service or by certified mail at the address shown on his most recent registration.

(*b*) Service of any other papers or notices required by these Rules shall, unless otherwise provided, be made in accordance with K. S. A. 60-205 as amended.

Rule 217
SUBPOENA POWER, WITNESSES AND PRETRIAL PROCEEDINGS

(*a*) The chairman of the Board, any member of a hearing panel, or the Clerk of the Supreme Court, acting under these Rules, may administer oaths and affirmations and, subject to the Rules of Civil Procedure, compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents. A respondent may, subject to the Rules of Civil Procedure, compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents before a hearing panel after formal disciplinary proceedings are instituted. Subpoenas shall clearly indicate that they are issued in connection with a confidential investigation under these Rules, and a breach of the confidentiality of the investigation by the person subpoenaed constitutes contempt of the Supreme Court. A person subpoenaed may consult with his attorney without committing a breach of confidentiality.

(*b*) The judge of the district court of any judicial district in which the attendance or production is required shall, upon proper application, enforce the attendance and testimony of any witness and the production of any docu-

ments so subpoenaed. Subpoena and witness fees and mileage shall be the same as in the district court.

(*c*) The Disciplinary Administrator in making investigations under these Rules is authorized to issue subpoenas and administer oaths.

(*d*) Upon request, the Disciplinary Administrator shall disclose to the respondent all evidence in his possession relevant to the proceeding. No other discovery shall be permitted.

(*e*) At the discretion of the hearing panel a prehearing conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the chairman of the panel or any member of the panel designated by its chairman.

(*f*) With the approval of the hearing panel, a deposition may be taken by stenographic means or by electronic recording as provided in K. S. A. 60-230 as amended if the witness is not subject to service of subpoena or is unable to attend or testify at the hearing because of age, illness or other infirmity. A complete record of the testimony so taken shall be made and preserved.

(*g*) The subpoena and deposition procedures shall be subject to the protective requirements of confidentiality provided in Rule 223.

Rule 218
DISBARMENT BY CONSENT OF ATTORNEY UNDER DISCIPLINARY INVESTIGATION

An attorney who, pending investigation of misconduct or while charges of misconduct against him are pending, voluntarily surrenders his license to practice law in this state or elsewhere, shall have his name stricken from the

roll of attorneys and the pending disciplinary proceedings shall terminate. When an attorney surrenders his license or is disbarred, the Clerk of the Supreme Court shall, by letter directed to the Clerks of the Supreme Courts of any other states and to federal courts in which it is known by the Clerk that the attorney is licensed to practice law, notify said Clerks of the prior proceedings in discipline in this state and the fact his name has been stricken from the roll of attorneys licensed to practice law in Kansas.

Rule 219
DISBARRED OR SUSPENDED ATTORNEYS

In the event any attorney licensed to practice law in Kansas shall hereafter be disbarred or suspended from the practice of law pursuant to these rules, or shall voluntarily surrender his license, such attorney shall forthwith notify each client or person represented by him in pending matters, of his inability to undertake further representation of such client after the effective date of such order, and shall also notify such client to obtain other counsel in each such matter. As to clients involved in pending litigation or administrative proceedings, such attorney shall also notify the appropriate court or administrative body, along with opposing counsel, of such inability to further proceed, and shall file appropriate motion to withdraw as counsel of record where necessary.

Rule 220
REINSTATEMENT

(*a*) Any attorney who shall have been disbarred or suspended may, by verified petition, apply for an order of reinstatement. Such petition shall bear the case number and caption appearing in the order of discipline, and an original and one copy thereof shall be filed with the Clerk of the Supreme Court. Such petition shall set forth facts

showing that the attorney has rehabilitated himself or that he is entitled to have the order of discipline vacated, terminated or modified.

(*b*) On receipt of such petition, the Clerk of the Supreme Court shall immediately forward a copy thereof to the Disciplinary Administrator, and the Board shall thereafter promptly consider the same and report to the Court in duplicate its findings, conclusions and recommendation. The proceeding shall be governed by the applicable provisions of the Rules governing hearings in disciplinary proceedings. The Clerk, on receipt of such report, shall mail a copy thereof to the respondent.

(*c*) If the report of the Board recommends denial of the petition, the attorney shall have fifteen days from the date of mailing of such recommendation to file with the Clerk of the Supreme Court exceptions thereto; whereupon, the matter shall stand submitted. If the report recommends reinstatement the matter shall stand submitted for consideration. Neither briefs nor oral argument shall be permitted unless requested by the Court. The Court may impose appropriate conditions for reinstatement.

Rule 221
PROCEEDINGS WHERE AN ATTORNEY IS DECLARED TO BE INCOMPETENT OR IS ALLEGED TO BE INCAPACITATED

(*a*) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to disability inactive status effective immediately and for an indefinite period until the further order of the Court. A copy of such order shall be served upon such attorney, his guardian, and the director of any institution

to which he is committed in such manner as the Court may direct.

(*b*) When the Board petitions the Supreme Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or addiction to drugs or intoxicants, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration, the Court concludes the attorney is incapacitated from continuing to practice law, it shall enter an order transferring said attorney to disability inactive status on the ground of such disability for an indefinite period and until the further order of the Court. Any pending disciplinary proceeding against the attorney shall be held in abeyance.

The Court shall provide for notice to the respondent of such proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the respondent if he is without adequate representation.

(*c*) If, during the course of a disciplinary proceeding, the respondent contends he is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for him to adequately defend himself the Court shall thereupon enter an order immediately, transferring the respondent to disability inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of (*b*) above.

If the Court shall at any time determine the respondent is not incapacitated from practicing law, it shall take such

action as it deems proper and advisable including a direction for the resumption of the disciplinary proceeding against the respondent.

(*d*) The Clerk of the Supreme Court shall promptly transmit a certified copy of the order of transfer to disability inactive status to the administrative judge of the judicial district in which the disabled attorney maintained his practice and shall request such action under the provisions of Rule 222 as may be indicated in order to protect the interests of the disabled attorney and his clients.

(*e*) No attorney transferred to disability inactive status under the provisions of this Rule may resume active status until reinstated by order of the Supreme Court. Any attorney transferred to disability inactive status under the provisions of this Rule shall be entitled to petition for reinstatement to active status once a year or at such shorter intervals as the Court may direct in the order transferring the respondent to disability inactive status or any modification thereof. Such petition shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and the attorney is fit to resume the practice of law. Upon receipt of the petition, the Court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed, including a direction for an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney.

Where an attorney has been transferred to disability inactive status by an order in accordance with the provision of (*a*) above and, thereafter, in a proceeding duly taken, the attorney has been judicially declared to be competent, the Court may dispense with further evidence that

the attorney's disability has been removed and may direct the attorney's reinstatement to active status upon such terms as are deemed proper and advisable.

(*f*) In a proceeding seeking a transfer to disability inactive status under this Rule, the burden of proof shall rest with the petitioner. In a proceeding seeking an order of reinstatement to active status under this Rule, the burden of proof shall rest with the respondent.

(*g*) The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the attorney's disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since the attorney's transfer to disability inactive status and he shall furnish to the Court written consent to each to divulge such information and records as requested by court-appointed medical experts.

Rule 222
APPOINTMENT OF COUNSEL TO PROTEST CLIENTS' INTERESTS

(*a*) When an attorney has been transferred to disability inactive status because of incapacity or disability, or the attorney has disappeared or died, or has been suspended or disbarred and there is evidence the attorney has not complied with Rule 219 or it appears the affairs of his clients are being neglected, the administrative judge of the judicial district in which the attorney maintained his practice shall appoint an attorney or attorneys to inventory the files of the inactive, disappeared, deceased, suspended or

disbarred attorney and with the approval of the judge take such action as seems necessary to protect the interests of the attorney and the attorney's clients.

(*b*) Any attorney so appointed shall not disclose any information contained in any files so inventoried except as necessary to carry out the order of the district court.

Rule 223
CONFIDENTIALITY

(*a*) All proceedings, reports and records of disciplinary investigations and hearings other than proceedings before the Supreme Court shall be private and shall not be divulged in whole or in part to the public except by order of the Court.

(*b*) Any person violating paragraph (*a*) may be subject to punishment for contempt of Court.

Rule 224
IMMUNITY

Complaints, reports, or testimony in the course of disciplinary proceedings under these Rules shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state.

Rule 225
ADMISSION TO THE BAR

(*a*) Applicants of good moral character and the requisite general education who are residents of the State of Kansas, who have complied with the Rules of the Supreme Court and of the State of Kansas, being graduates of the law department of the University of Kansas or some other accredited law school of equal requirements and reputation, will be admitted to examination in the law at such times as examinations shall be held by the Board. *Provided*, That a resident of another state who has been graduated from an accredited law school in this state may be admitted to the first or second examination held by the Board after such graduation.

(*b*) The Board shall conduct examinations of applicants for admission to the bar, and shall conduct such preliminary inquiries and investigations as may be necessary or proper to determine the qualifications of applicants to be examined and to be admitted. The Board shall be satisfied that all such applicants are (1) of good moral character, and (2) possessed of the requisite general education. Examinations shall be held regularly by the Board two times each year at dates to be determined by the Board, and subject to the prior approval of the Court. Special examinations may be held at the discretion of the Board.

(*c*) Any practicing attorney of any state or territory having professional business in the Supreme Court may be admitted for the time and purpose of such business upon taking the oath hereinafter set out, or such attorney may be heard by permission of the Court, on motion, without formal admission.

(*d*) All applications for admission to the bar shall be by petition to the Supreme Court, in duplicate, and filed with the Clerk of the Court at least ninety days prior to the next ensuing examination. Every petition shall be made on forms to be procured from the Clerk, shall be verified by the applicant, shall state his full name, the date and place of his birth, the facts showing his citizenship, the state of his residence, and such other information as may be required to complete the petition.

In addition to the foregoing, each applicant for admission to the bar as provided by Rule 225(*i*) shall file with the Clerk, in duplicate, his answers to a questionnaire to be procured from the Clerk, showing his educational qualifications, his study of the law, the date or dates of his admission to the bar of the highest court of another jurisdiction, occupations and employments in which he has been engaged and their locations, and other information elicited on the questionnaire. Every applicant for admission to the bar will also be required to produce and file with his petition a written certificate signed by a judge of the district court and three members of the bar of the county where he resides or has lately resided, or other evidence satisfactory to the Board that he is a person of good moral character.

No applicant for admission to the bar shall be examined until his application has been considered and approved by the Board.

Prior to granting approval to take the bar examination, it shall be the duty of the Board to investigate the moral character of each applicant, and it may call upon any state or local bar association or one or more members of the bar of the judicial district where the applicant resides, to make such investigation and report the results to the Board, and it may make such further investigation as may be necessary to fully inform itself concerning the moral fitness of the applicant.

The Board may require an applicant to submit fingerprints. In no event will permission be granted to take the bar examination until the investigation as to moral character has been completed. In every investigation the Board may obtain such information as bears upon the character, fitness and general qualifications of the candidate, take and hear testimony, administer oaths and affirmations, and compel by subpoena at the request of the applicant or of the Board, the attendance of witnesses and the production of books, papers and documents. Any member of the Board may administer such oaths and affirmations. The practice of law is a privilege and the burden of establishing his eligibility shall rest upon the applicant.

(*e*) Upon the filing of a petition, the Clerk shall immediately send to the Disciplinary Administrator one of the duplicates, and shall post the name and address of the applicant in a conspicuous place in his office for a period of sixty days.

(*f*) Applicants will be required to pass a satisfactory examination as to their learning in the law upon such of the following, or other subjects, as the Board may require: Personal property, domestic relations and family law, noncorporate business organizations and voluntary associations, agency and employment, U. C. C. and commercial transactions, legal ethics, contracts, corporations, real property, constitutional law, criminal law, civil and criminal procedure, torts, wills, trusts and administration, and evidence.

(*g*) At every examination each applicant shall draw a number on a slip of paper on which he shall write his name and deposit it in a sealed envelope with the Clerk of the Supreme Court. When the applicant shall have finished any book, he shall sign it with his number only and mark it as directed by the Board, and any other mark of identification placed upon the book shall disqualify it, and the Board may refuse to read or consider it.

(*h*) As soon as practicable after the completion of an examination, the Board shall file a report with the Clerk of the Supreme Court recommending the granting or the denial of the petition of the applicant. When such report recommends the granting of a petition, unless some

reason appears to the contrary, the Court will make an order admitting the applicant to practice in all the courts of the state, which order shall became effective upon his taking an oath, the form of which shall be in substance as follows:

> "You do solemnly swear that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all inferior courts of the State of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God."

Upon the making of such order the Clerk shall issue to each applicant a certificate of his authority to practice law in this and all inferior courts of the state, upon his signing his name on the roll of attorneys of the Court. When the Board recommends a denial of the petition, an order will be made to that effect.

Provided further, however, the authority granted to practice law shall not be exercised except as provided under Rule 116 when the licensee herein has been admitted to the bar of another state or territory and is regularly engaged in the practice of law in such other state or territory.

(*i*) Any applicant for admission to the bar of Kansas who was duly admitted to the practice of law by the highest court of another jurisdiction, who practiced there

continuously for a period of five years, and continued to practice there or elsewhere until within six months of making application for admission here, may be admitted to practice in this state without written examination as to his learning in the law upon showing by his application made in accordance with Rule 228 (2):

(1) That he is or will become a bona fide resident of the State of Kansas prior to the time he is admitted to the bar of Kansas;

(2) That at the time he was first admitted in another jurisdiction he was fully qualified to have taken the bar examination in this state under the Rules of the Supreme Court then in effect;

(3) That he is now and has been a person of good moral character and is a proper person to be admitted to the bar of Kansas; and

(4) That he will furnish to the Board such other and further information as it may require in the consideration of his application.

Upon final consideration of the application the Board will report in writing to the Supreme Court its recommendation as to whether the applicant shall be admitted.

All such applicants shall present themselves before the Board at its preliminary meeting preceding the regular semi-annual meeting at which they seek admission under this Rule.

(*j*) Any applicant for admission to the bar who is a graduate of an approved law school or who has been admitted to practice in the highest court of any other state, may, pending the hearing of his application, also file with the Clerk of the Supreme Court a request for a temporary permit to practice law. If the Court shall

find the applicant has had no opportunity to take an earlier examination, and that the circumstances are such to justify it, a temporary permit will be granted, expiring at the date the results of the next examination are announced if unsuccessful, or if successful on the date he is regularly admitted to the bar, or until the date application under Rule 225 (*i*) is acted upon the Court, effective upon his taking an oath to support the Constitution of the United States, and the Constitution of the State of Kansas, and to conform to the requirements of the attorney's oath prescribed by the Rules of the Court.

(*k*) In the event the Board shall recommend denial of an application filed under Rule 225 (*i*), a copy of the Board's report shall be furnished the applicant. The applicant may, within ten days or such other period as the Supreme Court might prescribe, file with the Clerk of the Court his exceptions to the Board's report or he may elect to make no filing.

(*l*) Upon receipt of a copy of the exceptions of the applicant, the Board shall file such additional material as it might deem appropriate, whereupon the matter shall stand submitted and the Supreme Court shall proceed to consider the matter.

(*m*) Registration costs referred to in Rule 228 shall constitute a fund to be known as the bar admission fee fund. Disbursements for compensation and expenses in connection with admissions shall be from this fund. Any unused balance may be applied to any deficiency in the bar disciplinary fee fund.

(*n*) Any applicant denied admission to the bar because of failure to make a satisfactory grade as a result of taking the examination provided in subparagraphs (*f*) and (*g*), shall have the right to inspect his examination papers at the office of the Clerk of the Supreme Court

if such a request is made not later than the thirtieth day after the mailing of the notice of denial of admission by the Clerk.

Rule 226
EXPENSES

(*a*) Each member of the Board shall receive as compensation for his services in the preparation for and the conduct of examinations for admission to the bar, the sum of five hundred dollars per year, and the secretary of the Board shall receive for his services as secretary the additional sum of five hundred dollars per year. All compensation due under this rule shall be paid monthly or in such other manner as shall be provided by law. In addition, each member of the Board shall be paid all actual and necessary expenses incurred in the performance of services for which he receives compensation.

(*b*) The salaries and expenses of the Disciplinary Administrator and staff, the administrative costs, and the per diem and expenses of the members of the Board, hearing panels and special prosecutors, shall be paid out of the funds collected under the provisions of Rule 209. The Disciplinary Administrator shall annually file a report of receipts and expenditures.

Rule 227
EDUCATIONAL AND MORAL QUALIFICATIONS

(*a*) Examinations relative to the qualifications of applicants shall be oral or in writing, or partly oral and partly in writing, in the discretion of the Board. They shall include an inquiry into the moral qualifications and general learning of each applicant as well as into his learning in the law. Each applicant shall satisfy the Board that he has completed a full course of study in both an

accredited college and an accredited law school and that he has been granted and holds a baccalaureate degree and a Bachelor of Laws or Juris Doctor degree or their equivalent or higher degrees. A full course of study means the satisfactory completion of the requirements for the baccalaureate degree and the completion of at least six additional semesters, or the equivalent, in an accredited law school. The standard for determining sufficiency of any educational requirement, or of courses of study leading to the granting of the degrees above mentioned, shall be that fixed and recognized by the University of Kansas.

(*b*) Correspondence schools are not recognized and applicants for admission to the bar will receive no credit for studies in such institutions.

(*c*) Diplomas showing that the applicant has earned and holds a baccalaureate degree and a Bachelor of Laws or Juris Doctor degree from accreditied colleges, universities or schools will be accepted as prima facie evidence that he has complied with all the requirements of Rule 227 (*a*). A certificate of graduation may be furnished in lieu of such diploma.

(*d*) In the event it shall be deemed necessary by the Board, as a result of the number of persons taking the examinations or by reason of the absence of one or more members of the Board, the Board may employ or otherwise obtain the services of one or more members of the Kansas Bar to assist the Board in the grading of bar examinations. Compensation for any member so employed shall be that agreed upon between such person and the Board, subject to the prior approval of the Court, and shall be paid from the Board's fund.

Rule 228
APPLICATION COSTS

(*a*) Excepting applicants under Rule 228 (*b*) hereof, each applicant shall pay to the Clerk of the Supreme Court the sum of fifty dollars as costs of the proceedings for admission to the bar. If the Board, after investigation, is of the opinion the applicant is not qualified to take the examination, it shall report such fact to the Clerk and fifty percent of the fee accompanying the application shall be returned by the Clerk to the applicant, but if the applciation is approved by the Board, such fee shall not be returned. If, upon examination by the Board, the petition of the applicant be denied, he may, with the consent of the Board, take a second examination without payment of additional costs, but an additional sum of fifty dollars shall be paid for the third and each subsequent examination.

(*b*) Each applicant for admission as provided by Rule 225 (*i*) shall pay to the Clerk of the Supreme Court the sum of two hundred dollars as costs of the proceedings for admission to the bar and shall furnish to the Court such information as the Court may require as to his legal and prelegal education, his reputation, character, and professional standing, and such other matters as the Court may specify, and such information shall be submitted to an investigating body or organization of the Court's selection for investigation of such information and a report thereon to the Court. The applicant shall pay to the Clerk the additional sum of one hundred twenty-five dollars to be applied to the cost of such investigation and report. If the application be denied for any reason, the applicant shall be entitled to a refund of fifty dollars and no more.

Rule 229
LEGAL INTERNS

The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, the following rule is adopted:

(*a*) Activities.

(1) Students shall be assigned as legal interns only to those attorneys, agencies and public bodies requesting their services. Requests shall be made to the deans of the respective law schools.

(2) An eligible law student may appear in any court or before any administrative tribunal in this state on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters:

(*i*) In any civil matter, other than domestic matters, wherein the amount in controversy is less than $300, the supervising lawyer is not required to be personally present in court if the person on whose behalf the appearance is being made expressly consents thereto in writing before the court. In all other civil matters the supervising attorney must be present personally throughout the proceedings and be fully responsible for the manner in which they are conducted.

(*ii*) Any criminal matter in which the defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or Rule of the Supreme Court. In such cases the supervising lawyer is not required to be personally present in court if the person on whose behalf an appearance is being made expressly consents thereto in writing before the Court.

(*iii*) Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or Rule of the Court. In such cases the supervising lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

(3) An eligible legal intern may also appear in any criminal matter on behalf of the state with the written approval of the prosecuting attorney or his authorized representative supervising the intern.

(4) In each case the written consent and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

(*b*) Requirements and Limitations. In order to make an appearance as a legal intern pursuant to this rule, the student must:

(1) Be duly enrolled in this state in an accredited law school, provided that law students who are bona fide residents of Kansas and are enrolled

in an accredited law school may be permitted to act as legal interns in the courts of Kansas on complying with the other provisions of this Rule.

(2) Have completed legal studies amounting to at least four semesters, or the equivalent if the school is on some basis other than a semester basis.

(3) Have filed an application for admission to the bar of this state.

(4) Be certified by the dean of his law school as being of good character and competent legal ability, and as being adequately trained to perform as a legal intern.

(5) Be introduced to the court in which he is appearing by an attorney admitted to practice in that court.

(6) Neither ask for nor receive any compensation or renumeration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, public defender agency, or the state, county or municipality from paying compensation to the legal intern, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

(7) Certify in writing that he has read and will abide by the Code of Professional Responsibility of the American Bar Association, and also subscribe to an oath that he will support the Constitution of the United States and the State of Kansas, and will faithfully perform the duties of a legal intern. Said certificate and oath are to be filed with the Clerk of the Supreme Court.

(*c*) Certification. The certification of a student by the law school dean:

(1) Shall be filed with the Clerk of the Supreme Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of eighteen months after it is filed or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination or who is admitted to the bar by special examination, the certification shall continue in effect until the date he is admitted to the bar.

(2) May be withdrawn by the dean at any time by filing a notice to that effect with the Clerk of the Supreme Court. It is not necessary that the notice state the cause for withdrawal.

(3) May be terminated by the Supreme Court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Clerk of the Supreme Court and with the dean of the law school in which the student is enrolled.

(*d*) Other activities.

(1) An eligible legal intern may engage in other activities under the general supervision of a member of the bar of this state, but outside the personal presence of that lawyer, including:

(*i*) Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear, but such pleadings or documents must be signed by the supervising lawyer.

(*ii*) Preparation of briefs, abstracts and other documents to be filed in appellate courts of

this state, but such documents must be signed by the supervising lawyer.

(*iii*) Assistance to indigent inmates of penal institutions or other persons who request such assistance in preparing applications for and supporting documents for post-conviction relief, except when the assignment of counsel in the matter is required by any constitutional provision, statute or Rule of the Court. If there is an attorney of record, all such assistance must be supervised by the attorney of record, and all documents submitted to the Court on behalf of such client must be signed by the attorney of record.

(*iv*) Each document or pleading must contain the name of the legal intern who has participated in drafting it. If he participated in drafting only a portion of it, that fact may be mentioned.

(2) A legal intern may not participate in oral argument in the Supreme Court.

(*e*) Supervision. The member of the bar under whose supervision an eligible legal intern does any of the things permitted by this Rule shall:

(1) Be an attorney regularly engaged in the practice of law in this state whose service as a supervising lawyer for this program is approved by the dean of the law school in which the student is enrolled.

(2) Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.

(3) Assist the student in his preparation to the extent he considers it necessary.

(4) Have supervision over no more than two legal interns at any one time, provided however, that this limitation shall not apply to full time staff members of recognized state or local legal aid societies, and county attorney, district attorney, municipal attorney, or attorney general offices, and provided further that the limitations of (*e*) (1) and (*e*) (4) shall not apply to a law professor regularly engaged in the teaching of law at one of the law schools referred to in (*b*) (1) who is a licensed attorney of the bar of this state and whose teaching duties include participation in a legal clinic operated as a regular part of the educational program of such law school.

(*f*) Miscellaneous. Nothing contained in this Rule shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of this Rule.

Rule 230
ADDITIONAL RULES OF PROCEDURE

(*a*) Except as otherwise provided in these Rules, time limitations are directory and not jurisdictional.

(*b*) Except as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases.

(*c*) In all cases where discipline is recommended, the panel or the Board shall certify to the Supreme Court the costs incurred in connection with the proceedings and the Court may, in the event discipline is imposed, assess against the respondent attorney the costs so certified. All costs so assessed shall be paid to the Clerk for deposit in the bar disciplinary fee fund.

Rule 231
CODE OF PROFESSIONAL RESPONSIBILITY

[New Rule Number]

APPENDIX "E"

Rules Relating to Discipline of Attorneys, Kansas Supreme Court Rules 201-225 (effective January 8, 1979)

PREFATORY RULE

(a) Rules Relating to Admission, Discipline and Disbarment of Attorneys, numbers 201 through 230, are hereby repealed. Creation of two boards, one to be known as the Kansas Board for Discipline of Attorneys and the other the Kansas Board for Admission of Attorneys, has necessitated promulgation of separate rules for each Board Rules Relating to Discipline of Attorneys, beginning with Rule 201, are hereby adopted, effective January 8, 1979. Rules Relating to Admission of Attorneys are also hereby adopted, effective January 8, 1979, and are numbered in the 700 series, beginning with Rule 701.

(b) The Code of Professional Responsibility, previously Rule 231, remains in effect and is renumbered as Rule 225.

Rule 201
JURISDICTION

(a) Any attorney admitted to practice law in this state and any attorney specially admitted by a court of this state for a particular proceeding is subject to the jurisdiction of the Supreme Court and the authority hereinafter established by these Rules.

(b) Nothing herein contained shall be construed to deny to any court such powers as are necessary to maintain control over proceedings conducted before that court.

Rule 202
GROUNDS FOR DISCIPLINE

The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally in conformity with the standard imposed upon members of the bar as conditions for the privilege of practicing law. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office as set forth in Rule 702(h), or the Code of Professional Responsibility as set forth in Rule 225 hereof, or as hereinafter amended, shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.

A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against said attorney based upon the conviction.

Rule 203
TYPES OF DISCIPLINE

(a) Misconduct shall be ground for:

(1) Disbarment by the Supreme Court; or

(2) Suspension by the Supreme Court; or

(3) Public censure by the Supreme Court; or

(4) Informal admonition by the Kansas Board for Discipline of Attorneys or the Disciplinary Administrator; or

(5) Any other form of discipline the Supreme Court deems appropriate.

(b) Temporary Suspension by the Supreme Court. The Supreme Court may, on its own motion or on motion of the Kansas Board for Discipline of Attorneys, issue a citation directing an attorney against whom disciplinary proceedings are pending to appear before the Court and show cause why his license to practice law should not be suspended during the pendency of such proceedings and, after hearing, the Court may enter an order suspending his license for a definite or indefinite period or may discharge the order to show cause.

Rule 204
KANSAS BOARD FOR DISCIPLINE OF ATTORNEYS

(a) The Supreme Court shall appoint a nine-member board to be known as the Kansas Board for Discipline of Attorneys (hereinafter referred to as the Disciplinary Board), which shall consist of:

(1) Three members of the bar of this state appointed for an initial term of three years;

(2) Three members of the bar of this state appointed for an initial term of two years; and

(3) Three members of the bar of this state appointed for an initial term of one year.

Subsequent terms of all members shall be for three years. No member shall serve for more than two consecutive three-year terms. Vacancies shall be filled by the Supreme Court.

(b) The Supreme Court shall designate one member as chairman and another as vice-chairman. The chairman shall appoint a secretary.

(c) The Disciplinary Board shall act only with the concurrence of a majority of those present and eligible to vote. Five members shall constitute a quorum.

(d) Disciplinary Board members shall refrain from taking part in any proceeding in which a judge similarly situated would be required to abstain.

(e) The Disciplinary Board shall exercise the powers and perform the duties conferred and imposed upon it by these Rules, including the power and duty to assign periodically three attorneys, at least two of whom shall be members of the Board, as a review committee to review and approve or modify recommendations by the Disciplinary Administrator for dismissals, informal admonitions, and institution of formal charges. The members of the review committee shall not participate in any final hearing by the Board, or by a hearing panel appointed by it, on any complaint they have reviewed.

(f) The per diem and expenses of the members of the Disciplinary Board, hearing panels, and special prosecutors, shall be paid out of the funds collected under the provisions of Rule 208.

(g) The Disciplinary Board may adopt procedural rules not inconsistent with Rules set forth herein.

Rule 205
DISCIPLINARY ADMINISTRATOR

(a) A Disciplinary Administrator shall be appointed by the Supreme Court and shall serve at the pleasure of the Court. The Disciplinary Administrator and his staff shall receive such salaries as may be determined by the Court and be reimbursed for travel and other expenses incidental to their duties from the funds collected under the provisions of Rule 208. The Disciplinary Administrator

shall annually file a report of receipts and expenditures. The Disciplinary Administrator shall be a member of the bar of the State of Kansas.

(b) Neither the Disciplinary Administrator nor any member of his staff shall be permitted to engage in private practice except that the Supreme Court may fix a reasonable period of transition after appointment.

(c) The Disciplinary Administrator shall have the power and duty:

(1) To employ and supervise staff needed for the performance of his duties, subject to approval by the Supreme Court.

(2) To investigate or cause to be investigated, all matters involving possible misconduct, whether called to his attention by complaint or otherwise.

(3) To present all matters involving alleged misconduct to the review committee.

(4) To file with the Supreme Court certificates of conviction of attorneys for crimes.

(5) To maintain permanent records of all matters processed and the disposition thereof.

(6) To prepare for and prosecute all disciplinary prodeedings instituted to determine misconduct of attorneys before hearing panels, the Disciplinary Board, and the Supreme Court.

(7) To appear at hearings conducted with respect to petitions for reinstatement of (aa) suspended or disbarred attorneys, or (bb) attorneys transferred to inactive status because of disability; to cross-examine witnesses testifying in support of the petitions and to present any available evidence in opposition thereto.

(8) To perform such other duties as may be conferred and imposed upon him by the Supreme Court.

Rule 206
GRIEVANCE COMMITTEES

(a) The Disciplinary Administrator may call upon any member of the bar of this state or any local or state bar association grievance committee to investigate or assist in the investigation of any complaint upon the terms and conditions the Disciplinary Administrator shall direct.

(b) The members of the bar or grievance committees shall assist the Disciplinary Administrator in investigations and such other matters as may be requested of them.

Rule 207
DUTIES OF THE BAR AND JUDICIARY

(a) It shall be the duty of each member of the bar of this state to aid the Supreme Court, the Disciplinary Board, and the Disciplinary Administrator in investigations concerning complaints of misconduct, and to communicate to the Disciplinary Administrator any information he may have affecting such matters.

(b) It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct, which in his opinion constitutes misconduct of an attorney under these Rules.

(c) It shall be the duty of each judge of this state to report to the Disciplinary Administrator any act or omission on the part of an attorney appearing before him, which, in the opinion of the judge, may constitute misconduct under these Rules. Upon receipt of such report, it shall be processed as hereinafter provided for complaints. Nothing herein shall be construed in any manner as limiting the powers of such judge in contempt proceedings.

Rule 208
REGISTRATION OF ATTORNEYS

(a) All attorneys, including justices and judges, admitted to the practice of law before the Supreme Court of the State of Kansas shall annually, on or before the first day of July, register with the Clerk of the Appellate Courts upon such form as the Clerk shall prescribe; provided that in the year of an attorney's admission to the bar, the attorney shall register within thirty days after the date of admission. At the time of each registration, each registrant shall pay an annual fee in such amount as the Supreme Court shall order.

(b) No registration fee shall be charged to any attorney newly admitted to the practice of law in Kansas until the first regular registration date following admission.

(c) On or before June 1 of each year the Clerk of the Appellate Courts shall mail to each individual attorney then authorized to practice law in this state, at his last known office address, a statement of the amount of the registration fee to be paid for the next year. Failure of any attorney to receive a statement from the Clerk shall not excuse the attorney from paying the required fee. Every registrant shall within thirty days after any change of his office address notify the Clerk of such change.

(d) Any attorney who fails to pay the registration fee by August 1 of each year may be suspended from the practice of law in this state as prescribed in subsection (e). It shall be the duty of each member of the judiciary of this state to prohibit any attorney who has been suspended from the practice of law from appearing or practicing in any court, and it shall be the duty of each member of the bar and judiciary to report to the Disciplinary Administrator any attempt by an attorney to practice law after his suspension.

(e) The Clerk of the Appellate Courts shall mail a notice to any attorney who has failed to comply with subsection (a) that his right to practice law will be summarily suspended thirty days following the mailing of notice if such registration fee is not paid within that time. The notice shall be forwarded to his last known address by certified mail, return receipt requested. The Clerk shall certify to the Supreme Court the names of attorneys who fail to register and pay said fee within said period of time. Thereupon, the Court shall issue an order suspending said attorneys from the practice of law in this state and the Clerk shall mail a copy of the order to the administrative judge of the attorney's district. No notice shall be mailed and no order of suspension issued to any attorney who has complied with subsection (j) hereof.

(f) An attorney whose authority to practice law in this state has ceased solely because of his failure to register and pay the annual registration fee may be reinstated by the Supreme Court upon application by such attorney and the payment by such attorney of all delinquent registration fees (except back fees may be waived for good cause shown), and payment of such additional amount as the Court may require.

(g) The Clerk of the Appellate Courts shall issue to each attorney duly registered hereunder a registration card in a form approved by the Supreme Court, evidencing such annual registration.

(h) All moneys collected as registration fees hereunder shall be deposited by the Clerk of the Appellate Courts in a bar disciplinary fee fund. Disbursements from such fund shall be made only upon vouchers signed by a member of the Supreme Court or by some person or persons duly authorized by the Court, and such disburse-

ments shall be made only to defray the cost and expense of administering the registration procedure established hereunder and the disciplinary procedures carried on pursuant to the Rules of the Supreme Court.

(i) An attorney appearing in any action or proceeding in this state solely in accordance with the provisions of Rule 116 of the Supreme Court shall not be subject to registration hereunder.

(j) An attorney who has retired or is not engaged in the practice of law in this state may so notify the Clerk of the Appellate Courts in writing. Upon the filing of such notice, the attorney shall not be eligible to practice law in this state until such time as he shall make application and be reinstated by the Supreme Court as provided in subsection (f). Any such attorney shall be relieved from the payment of the annual registration fee during the period of retirement or inactive status; provided, any attorney whose retirement or inactive status has extended over a period of five years shall not be reinstated until such time as he complies with any conditions imposed by the Supreme Court for reinstatement.

Rule 209
COMPLAINTS

All complaints or reports relating to misconduct of any attorney shall be filed with the Disciplinary Administrator. Any complaints or reports filed with the Disciplinary Board or any member thereof, the Clerk of the Appellate Courts, any state or local bar grievance committee, or any other body shall be immediately delivered to the Disciplinary Administrator. The Disciplinary Administrator shall promptly docket all complaints or reports received.

Rule 210
INVESTIGATIONS

(a) All investigations, whether upon complaint or otherwise, shall be initiated and conducted by the disciplinary Administrator or under his supervision.

(b) The Disciplinary Administrator may refer a complaint or report to the state bar association grievance committee, a local bar association grievance committee, or any member of the bar of this state, for investigation and report. The Disciplinary Administrator may at any time withdraw such referral and have the complaint or report otherwise investigated.

(c) Upon the conclusion of an investigation, the Disciplinary Administrator shall recommend to the review committee dismissal of the complaint, informal admonition of the attorney concerned, or prosecution of formal charges before a hearing panel. Disposition shall thereupon be made by a majority vote of the review committee, unless it directs further investigation. A complaint shall not be referred for panel hearing unless the review committee finds by a majority vote that there is probable cause to believe there has been a violation of the Code of Professional Responsibility or of the Attorney's Oath which may require formal discipline of the respondent.

Rule 211
FORMAL HEARINGS

(a) Hearings shall be conducted by a panel of three attorneys, at least two of whom shall be members of the Disciplinary Board. Hearings may be held at any place in the state. The chairman of the Disciplinary Board shall designate the members of the panel, the presiding officer thereof, and the matters to be heard by the panel.

The presiding officer shall be a member of the Disciplinary Board.

(b) Formal disciplinary proceedings shall be instituted by the Disciplinary Administrator by filing a complaint with the secretary of the Disciplinary Board. The complaint shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the complaint shall be served upon the respondent. The respondent shall serve an answer upon the Disciplinary Administrator within twenty days after the service of the complaint unless such time is extended by the Disciplinary Administrator or the hearing panel.

(c) Following the service of the answer, or upon respondent's failure to answer, the matter shall be set for hearing by the presiding officer of the panel.

(d) The Disciplinary Administrator shall serve a notice of hearing upon the respondent, respondent's counsel, and the complaining parties. The notice shall state that the respondent is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence. The notice shall also state the date and place of the hearing and shall be served at least fifteen days in advance of the hearing date. The hearing shall be governed by the Rules of Evidence as set forth in the Code of Civil Procedure. (Art. 4, Ch. 60, Kansas Statutes Annotated.)

(e) All witnesses shall be sworn and all proceedings and testimony shall be recorded, either by stenographic means or by electronic recording.

(f) At the conclusion of a hearing held by a panel, a report shall be made to the Disciplinary Board setting forth findings and recommendations, which report shall be signed by a majority of the panel and submitted to the Board. To warrant a finding of misconduct the charges must be established by clear and convincing evidence.

A unanimous panel report shall be deemed a final hearing report and shall be filed, served and acted upon as hereinafter provided.

If a panel report is not unanimous, the report, findings and recommendations of the panel shall be reviewed by the Disciplinary Board, exclusive of members who acted on the matter as members of the review committee (see Rule 204 [e]). The Disciplinary Board shall act thereon and make its recommendations which, together with the panel report, shall constitute the final hearing report.

A copy of the final hearing report shall be mailed or delivered by the Disciplinary Administrator to the respondent and to counsel of record.

If the final hearing report does not recommend discipline the report shall be filed with the secretary of the Disciplinary Board and with the Disciplinary Administrator.

If the final hearing report recommends discipline of disbarment, suspension, or public censure, as prescribed by Rule 203(a)(1), (2) or (3), the report, findings and recommendations of the panel and the Disciplinary Board, together with the complaint, answer and transcript, if any, shall be filed with the Clerk of the Appellate Courts and the matter shall proceed as provided by Rule 212.

Rule 212
PROCEEDINGS BEFORE THE SUPREME COURT

(a) All disciplinary proceedings filed in the Supreme Court shall be conducted in the name of the State of Kansas.

(b) Cases for hearing before the Supreme Court shall be filed with the Clerk of the Appellate Courts and shall contain a copy of the complaint and respondent's answer,

together with fifteen copies of the panel's report and fifteen copies of the Disciplinary Board's recommendation, if any, thereupon, the matter shall be docketed by the Clerk as:

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas,	)	No. .....
v.	)	Original Proceedings
Attorney, *Respondent*.	)	in Discipline

The complaint, answer, report, findings and recommendation of the hearing panel, recommendation of the Disciplinary Board, if any, and transcript, if any, shall constitute the record in the case.

(c) Upon docketing of said case the Clerk of the Appellate Courts shall mail a copy of the report to the respondent, and shall issue a citation directing the respondent to file with the Clerk either (1) a statement that respondent does not wish to file exceptions to the report, findings, and recommendation, or (2) respondent's exceptions to the report. If respondent's address is unknown and a copy of said report and citation cannot be served upon said respondent, the matter shall stand submitted on the merits upon the filing of a certificate by the Clerk disclosing such facts.

(d) If the respondent fails to file exceptions to the report within twenty days after receipt thereof the Supreme Court shall fix a time and place for the imposition of discipline and the Clerk of the Appellate Courts shall notify the respondent by registered or certified mail of such time and place. The respondent shall appear in person and may be accompanied by counsel and make a statement with respect to the discipline to be imposed. Thereafter, the Supreme Court shall impose such discipline as may be deemed proper and just.

(e) If the respondent files exceptions the following steps shall be taken:

(1) The Clerk of the Appellate Courts shall immediately cause a transcript of the record of the proceedings before the panel to be prepared and filed and a copy to be served upon respondent. Such transcript shall be a part of the record and both the state and respondent may refer thereto in their respective briefs, setting forth with particularity the pages of transcript where the material referred to may be found.

(2) The respondent shall have thirty days from service of the transcript to file a brief.

(3) Upon the filing of respondent's brief, the Disciplinary Administrator or special prosecutor shall have thirty days in which to file a brief, and respondent shall have ten days after filing of the brief of the Disciplinary Administrator or the special prosecutor to file a reply brief. The briefs shall be of such number and form and be served in such manner as is provided by the Rules relating to appeals in civil actions.

(4) If, after thirty days from the service of the transcript upon respondent, he fails to file a brief, he will be deemed to have conceded that the findings of fact made by the hearing panel are supported by the evidence.

(5) The matter shall be set for hearing and heard on the merits.

Rule 213
REFUSAL OF COMPLAINANT TO PROCEED

Neither unwillingness or neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement or compromise between the complainant and the attorney, nor restitution by the attorney, nor the voluntary surrender of his license, shall justify abatement of any complaint.

Rule 214
MATTERS INVOLVING RELATED PENDING CIVIL OR CRIMINAL LITIGATION

Processing of complaints shall not be deferred or abated because of substantial similarity to the material allegations of pending civil or criminal litigation, unless authorized by a review committee or hearing panel.

Rule 215
SERVICE

(a) Service upon the respondent of the complaint in any disciplinary proceeding shall be made by the Disciplinary Administrator, either by personal service or by certified mail at the address shown on his most recent registration, or by certified mail at his last known office address.

(b) Service of any other papers or notices required by these Rules shall, unless otherwise provided, be made in accordance with K.S.A. 60-205.

Rule 216
SUBPOENA POWER, WITNESSES AND PRETRIAL PROCEEDINGS

(a) The chairman of the Disciplinary Board, any member of a hearing panel, or the Clerk of the Appellate Courts, acting under these Rules, may administer oaths

and affirmations and subject to the Rules of Civil Procedure, compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents. A respondent may, subject to the Rules of Civil Procedure, compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents before a hearing panel after formal disciplinary proceedings are instituted. Subpoenas shall clearly indicate that they are issued in connection with a confidential investigation under these Rules, and a breach of the confidentiality of the investigation by the person subpoenaed constitutes contempt of the Supreme Court. A person subpoenaed may consult with his attorney without committing a breach of confidentiality.

(b) The judge of the district court of any judicial district in which the attendance or production is required shall, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in the district court.

(c) The Disciplinary Administrator in making investigations under these Rules is authorized to issue subpoenas and administer oaths.

(d) Upon request, the Disciplinary Administrator shall disclose to the respondent all evidence in his possession relevant to the proceeding. No other discovery shall be permitted.

(e) At the discretion of the hearing panel, a prehearing conference may be ordered for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Said conference may be held before the chairman of the panel or any member of the panel designated by its chairman.

(f) With the approval of the hearing panel, a deposition may be taken by stenographic means or by electronic recording as provided in K.S.A. 60-230 if the witness is not subject to service of subpoena or is unable to attend or testify at the hearing because of age, illness or other infirmity. A complete record of the testimony so taken shall be made and preserved.

(g) The subpoena and deposition procedures shall be subject to the protective requirements of confidentiality provided in Rule 222.

Rule 217
DISBARMENT BY CONSENT OF ATTORNEY UNDER DISCIPLINARY INVESTIGATION

An attorney who, pending investigation of misconduct or while charges of misconduct against him are pending, voluntarily surrenders his license to practice law in this state or elsewhere, shall have his name stricken from the roll of attorneys and the pending disciplinary proceedings shall terminate. When an attorney surrenders his license or is disbarred, the Clerk of the Appellate Courts shall, by letter directed to the Clerks of the Supreme Courts of any other states and to federal courts in which it is known by the Clerk that the attorney is licensed to practice law, notify said Clerks of the prior proceedings in discipline in this state and the fact his name has been stricken from the roll of attorneys licensed to practice law in Kansas.

Rule 218
DISBARRED OR SUSPENDED ATTORNEYS

In the event any attorney licensed to practice law in Kansas shall hereafter be disbarred or suspended from the practice of law pursuant to these Rules, or shall voluntarily surrender his license, such attorney shall forthwith

notify in writing each client or person represented by him in pending matters, of his inability to undertake further representation of such client after the effective date of such order, and shall also notify in writing such client to obtain other counsel in each such matter. As to clients involved in pending litigation or administrative proceedings, such attorney shall also notify in writing the appropriate court or administrative body, along with opposing counsel, of such inability to further proceed, and shall file an appropriate motion to withdraw as counsel of record.

Rule 219
REINSTATEMENT

(a) Any attorney who shall have been disbarred or suspended may, by verified petition, apply for an order of reinstatement. Such petition shall bear the case number and caption appearing in the order of discipline, and an original and one copy thereof shall be filed with the Clerk of the Appellate Courts. Such petition shall set forth facts showing that the attorney has rehabilitated himself or that he is entitled to have the order of discipline vacated, terminated or modified.

(b) On receipt of such petition, the Clerk of the Appellate Courts shall immediately forward a copy thereof to the Disciplinary Administrator, and the Disciplinary Board shall thereafter promptly consider the same and report to the Supreme Court in duplicate its findings, conclusions and recommendations. The proceeding shall be governed by the applicable provisions of the Rules governing hearings in disciplinary proceedings. The Clerk, on receipt of such report, shall mail a copy thereof to the respondent.

(c) If the report of the Disciplinary Board recommends denial of the petition, the attorney shall have fifteen

days from the date of mailing of such recommendation to file with the Clerk of the Appellate Courts exceptions thereto; whereupon, the matter shall stand submitted. If the report recommends reinstatement the matter shall stand submitted for consideration. Neither briefs nor oral argument shall be permitted unless requested by the Supreme Court. The Supreme Court may impose appropriate conditions for reinstatement.

Rule 220
PROCEEDINGS WHERE AN ATTORNEY IS DECLARED TO BE INCOMPETENT OR IS ALLEGED TO BE INCAPACITATED

(a) Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to disability inactive status effective immediately and for an indefinite period until the further order of the Court. A copy of such order shall be served upon such attorney, his guardian, and the director of any institution to which he is committed in such manner as the Court may direct.

(b) When the Disciplinary Board petitions the Supreme Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate. If, upon due consideration, the Court concludes the attorney is incapacitated from continuing to practice law, it shall enter an order transferring said attorney to disability inactive status on the ground of

such disability for an indefinite period and until the further order of the Court. Any pending disciplinary proceeding against the attorney shall be held in abeyance.

The Supreme Court shall provide for notice to the respondent of such proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the respondent if he is without adequate representation.

(c) If, during the course of a disciplinary proceeding, the respondent contends he is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for him to adequately defend himself, the Supreme Court shall thereupon enter an order immediately, transferring the respondent to disability inactive status until a determination is made of the respondent's capacity to continue to practice law in a proceeding instituted in accordance with the provisions of subsection (b) above.

If the Supreme Court shall at any time determine the respondent is not incapacitated from practicing law, it shall take such action as it deems proper and advisable, including a direction for the resumption of the disciplinary proceeding against the respondent.

(d) The Clerk of the Appellate Courts shall promptly transmit a certified copy of the order of transfer to disability inactive status to the administrative judge of the judicial district in which the disabled attorney maintained his practice and shall request such action under the provisions of Rule 221 as may be indicated in order to protect the interests of the disabled attorney and his clients.

(e) No attorney transferred to disability inactive status under the provisions of this Rule may resume active

status until reinstated by order of the Supreme Court. Any attorney transferred to disability inactive status under the provisions of this Rule shall be entitled to petition for reinstatement to active status once a year or at such shorter intervals as the Supreme Court may direct in the order transferring the respondent to disability inactive status or any modification thereof. Such petition shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and the attorney is fit to resume the practice of law. Upon receipt of the petition, the Court may take or direct such action as it deems necessary or proper to a determination of whether the attorney's disability has been removed, including a direction for an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney.

Where an attorney has been transferred to disability inactive status by an order in accordance with the provisions of subsection (a) and thereafter, in a proceeding duly taken, the attorney has been judicially declared to be competent, the Supreme Court may dispense with further evidence that the attorney's disability has been removed and may direct the attorney's reinstatement to active status upon such terms as are deemed proper and advisable.

(f) In a proceeding seeking a transfer to disability inactive status under this Rule, the burden of proof shall rest with the petitioner. In a proceeding seeking an order of reinstatement to active status under this Rule, the burden of proof shall rest with the respondent.

(g) The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status because of disability shall be deemed to constitute

a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the attorney's disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since the attorney's transfer to disability inactive status and he shall furnish to the Court written consent to each to divulge such information and records as requested by court-appointed medical experts.

Rule 221
APPOINTMENT OF COUNSEL TO PROTECT CLIENTS' INTERESTS

(a) When an attorney has been transferred to disability inactive status because of incapacity or disability, or the attorney has disappeared or died, or has been suspended or disbarred and there is evidence the attorney has not complied with Rule 218 or it appears the affairs of his clients are being neglected, the administrative judge of the judicial district in which the attorney maintained his practice shall appoint an attorney or attorneys to inventory the files of the inactive, disappeared, deceased, suspended or disbarred attorney and with the approval of the judge take such action as seems necessary to protect the interests of the attorney and the attorney's clients.

(b) Any attorney so appointed shall not disclose any information contained in any files so inventoried except as necessary to carry out the order of the district court.

Rule 222
CONFIDENTIALITY

(a) All proceedings, reports and records of disciplinary investigations and hearings, except as hereinafter provided, shall be private and shall not be divulged in whole

or in part to the public except by order of the Supreme Court.

(b) Any person violating subsection (a) may be subject to punishment for contempt of the Supreme Court.

(c) The rule of confidentiality shall not apply to any information which the Board considers to be relevant to any current or future criminal prosecution against the attorney.

(d) Upon referral by a review committee of a complaint for panel hearing and after a determination of probable cause as provided in 210(c), all subsequent proceedings, and the record pertinent thereto, shall be public and no longer subject to the confidentiality hereinbefore set forth.

(e) The Disciplinary Administrator is authorized, in his discretion, to disclose to the Supreme Court Nominating Commission, District Judicial Nominating Commissions, or to the Governor, all or any part of the file involving any prospective nominee for judicial appointment; and the Board is authorized, in its discretion, to make public all or any part of its files involving any candidate for election to or retention in public office.

(f) Upon the completion of any investigation which results in dismissal or informal admonition the Disciplinary Administrator shall notify the complainant of the action taken and is hereby authorized to reveal to such complainant such information as he deems necessary to adequately explain the basis for the decision and action of the review committee.

Rule 223
IMMUNITY

Complaints, reports, or testimony in the course of disciplinary proceedings under these Rules shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state.

Rule 224
ADDITIONAL RULES OF PROCEDURE

(a) Except as otherwise provided in these Rules, time limitations are directory and not jurisdictional.

(b) Except as otherwise provided, the Rules of Civil Procedure apply in disciplinary cases.

(c) In all cases where discipline is recommended, the Disciplinary Administrator shall certify to the Supreme Court costs incurred in connection with the proceedings and the Court may, in the event discipline is imposed, assess against the respondent attorney the costs so certified. All costs so assessed shall be paid to the Clerk of the Appellate Courts for deposit in the bar disciplinary fee fund.

Rule 225
CODE OF PROFESSIONAL RESPONSIBILITY

[New Rule number]